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AMERICAN PRECEDENTS IN AUSTRALIAN FEDERATION

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PREFACE

THE superficial resemblance of the Australian to the American Constitution is obvious. Both organize a federal government. Both separate that government into three branches. Both establish a legislature composed of a house of representatives elected on a popular basis and a senate in which the states are equally represented. Both provide for a supreme or high court and empower the federal legislature to establish a system of inferior federal courts. Both constitutions delegate large powers, many of which are the same in the two documents, to the federal government, reserving the powers not so delegated to the states composing the union. Both carefully guarantee the integrity of these states and preserve to them large and essential powers.

An attempt has been made in this study to discover what the makers of the Australian Constitution knew about American institutions and to what extent they deliberately followed American precedents and were conscious of the resemblances of the two constitutions. It will be obvious that other governments than that of the United States—particularly those of Great Britain and Canada—contributed greatly to the making of the Australian Constitution, and that parts of the new government are purely Australian, or partly Australian, in origin. It has not, however, been the primary object of this study to trace influences other than American.

The records of the debates in the conferences and conventions in which the Australian Constitution was framed, and

in the colonial parliaments where it was considered, together with the reports and comments of newspapers, reveal something of the knowledge of American government which was possessed by Australians. These often show how American precedents may have influenced Australian constitution-making; occasionally they show conclusively that such an influence actually accounted for the decisions made. Frequently, however, the influence can only be inferred Much happened of which the official records and the press give little information. The participants in the federal movement wrote little about it subsequently. Quick and Garran's *Annotated Constitution of the Australian Commonwealth,* written by two men who played parts of some importance, gives an excellent and authoritative account of the federal movement and explores the history of each clause of the Constitution, but the knowledge and the attitudes which influenced leaders, convention members, and public opinion are not set forth. B. R. Wise, who was also active in the movement, in his *Making of the Australian Commonwealth* throws more light on the views of individuals and on the circumstances under which various clauses were introduced into the Constitution, but he has also left much untold. Sir George Reid's *My Reminiscences* could have added much to the story, but fails to do so. Sir Henry Parkes' *Fifty years in the Making of Australian History* supplements the records somewhat for the early years of the federal decade. Adequate biographies of the federal leaders are lacking; Murdoch's *Alfred Deakin: A Sketch* stands alone, and it does not attempt a full biography. Some information about the more informal phases of the movement may be gleaned from the press.

No brief account of Australian federation could easily improve on the Introduction to Quick and Garran's *Annotated Constitution* The historical sketch included in Chapters I and II of this study accordingly follows Quick and Garran

save in the account of the early federation movement, where C. D. Allin's admirable *Early Federation Movement of Australia* has been preferred, and save in some occasional supplementing from newspapers and the debates of the colonial parliaments. As in the case of the biographical sketches of federal leaders, the purpose in these chapters has been not to present "new" information but to fill in background necessary for the study of American influence

Quick and Garran, it should again be noted, give the historical background of the Australian Constitution phrase by phrase, calling attention to precedents in the Australian colonies and in England, Canada, the United States and Switzerland. They also print the Constitution Act of 1900, as do Moore, in *The Constitution of the Commonwealth of Australia,* and Egerton, in *Federations and Unions in the British Empire.* It has seemed wise to reprint in the appendix three sets of resolutions in accordance with which two Australian constitutions were drafted, together with one committee report, one compromise of outstanding importance, and one sample of the debates in which American precedents figured considerably.

This study grew out of the seminar of Professor Robert Livingston Schuyler at Columbia University, and has had the invaluable benefit of his generous interest and counsel throughout its progress. It need hardly be said that many errors of omission, commission and judgment have been corrected through his careful reading of the manuscript and proof. Neither the extent of my obligation nor of my appreciation can be expressed here.

The study has also profited greatly from the suggestions of Professor Evarts Boutell Greene, who very kindly read it in proof.

It is a pleasure to recall the courtesy of Sir Charles Lucas, and the cordiality and helpfulness of the library

staff both of the Royal Empire Society, formerly the Royal Colonial Institute, and of the British Museum. The heavy debt of the work to the Columbia University Library is gratefully acknowledged.

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CHAPTER I

INTRODUCTION

I. AUSTRALIAN AND AMERICAN FEDERATION

PARALLELS between federation in Australia and America were constantly pointed out in the course of the Australian federal movement. Some of these comparisons were merely superficial or were even more notable for the divergences than for the similarities which were involved, but others were deeper and more significant.

In both Australia and the United States a group of political units quite independent of each other, of distinct individuality, each with firmly established political institutions, and most of them with economic interests which conflicted with those of neighboring units, were driven to seek greater economic and military strength through union In both cases a desire for greater prestige, for a more efficient organization of public finance, and for the removal of the causes of ill-feeling among the various units played a part.

In America, however, the units were thirteen "sovereign republics," differing somewhat in origin and to some extent in racial stock and in political, social, and economic organization; in Australia they were six colonies, self-governing but not independent, bound to consider their relationship to a mother country, but enjoying—comparatively speaking, at least—the advantage of uniformity in origin, race, political and social institutions, and, to a great extent, in economic life.

In both instances there had been some brief experience

with a loose form of political union. The Articles of Confederation had been disastrous in their weakness, and their failure had convinced men of substance in the thirteen states that a closer and more powerful organization was an immediate necessity. The Australasian Federal Council, established in 1885, while generally admitted to be inadequate as a permanent form of union, had not been tested by a severe crisis, and might, save for the agitations of politicians interested in exploiting a new issue and of statesmen interested in anticipating the future, have served Australia's needs for some years longer. As several participants in the federal movement remarked, the Australian colonies were federating at their leisure while the American states had acted under greater economic pressure and military necessity. The need for military coöperation was a factor in bringing about both federations, though in America the Indians and the British garrisons persistently lingering in the Northwest constituted a concrete menace, while Australian leaders, in spite of the pessimistic report on Australian defense made by General Edwards in 1889, the Japanese victory over China, and Germany's increasing interest in the Pacific, could only point to possible dangers.

In both movements the advantages of free trade among the units were obvious to the majority and had been emphasized by unpleasant experiences. Here again, however, the need for action was not as pressing in Australia as it had been in the United States. Nor did foreign competition in manufactures constitute a menace as it had done in America.

Australian arguments accordingly stressed destiny, nationality, increased prestige abroad and greater influence within the Empire, and the desirability, frequently mentioned, of "enlarged powers" in such local matters as immigration and the tariff. The benefits of intercolonial free trade,

however, seldom failed to receive attention, and references to possible dangers from China, Japan, and Germany became rather more numerous in the later years.

To some extent economic factors were an obstacle rather than an incentive to Australian union. Many merchants and manufacturers were apprehensive lest free trade among the states [1] open their markets to ruinous competition. Convinced free traders feared a high federal tariff; convinced protectionists hesitated at the possibility of federal free trade. It was continually argued that a federated Australia would be able to effect great savings through a lower interest rate on the public debt, but on the other hand a fear was often expressed in the more prosperous colonies that they would be called upon to aid their poorer neighbors. At Philadelphia the financial problem caused no great difficulty, being little more than the necessity for providing the federal government, previously bankrupt, with an income. In Australia the problem proved one of the most troublesome before the delegates, taking the form of how to effect an equitable distribution of the surplus which would accrue from the tariff, and how to guarantee the financial future of the states.

The political background of both the thirteen states and the six colonies was British, but the independence of the former, together with the experience which had led them to seek their freedom, and the constitutional development of a century, introduced important differences. Precedents established during the colonial period, the quarrel of America with George III, and a sympathetic study of Montesquieu, resulted in a deliberate separation of the American executive and legislature; the development of responsible government in England and its extension to the colonies which were to

[1] Strictly speaking the colonies were not "states" until federation was accomplished. In practice, however, the terms were used as synonymous throughout the convention period, and they will be so used here.

form the Commonwealth, made such a separation extremely unlikely in Australia, and accounted for one of the major differences between the Australian and American governments.

The changes of a hundred years necessitated divergences from any eighteenth century model The industrial revolution and the attendant development of facilities for transportation and communication, of great cities, of commerce, and of generally closer relationships between neighboring and distant states, lengthened the number of subjects requiring consideration, and the number of powers assigned to the central government. The growth of democracy and the existence of older federations whose experience could be consulted modified details.

The smaller number and the larger area of the Australian units seem in themselves not to have affected the terms of the union save in increasing the number of senators allotted to each state, but the greater disparity in population and wealth led the larger colonies to insist upon a provision for the breaking of " deadlocks ", an addition which constitutes another outstanding difference between the Commonwealth Constitution and its American prototype.

In spite of these differences, however, the similarities in the two situations were numerous, and seemed to Australians to necessitate a close following of the path marked out at Philadelphia. With a few additions the powers entrusted to the Australian parliament were those which had been delegated in America to Congress. Without serious dissent it was decided to reserve to the states all powers not assigned by the constitution to the federal government, as had been done in the American Tenth Amendment. Again as in the United States, the Australian conventions encountered their most difficult obstacle and most dangerous subject of contention in the question of state rights. The judiciary as

organized in the United States was found to meet Australian needs with only slight modification, and the experience of the United States—recorded in the Constitution, in statutes, in judicial decisions, and in the writings of authorities such as Story and Bryce—provided suggestions and guidance in solving problems in interstate commerce and the control of railroads and rivers. Not infrequently the experience of the United States furnished illustration and arguments for both sides of the same question, and it need scarcely be remarked that American influence accounted in some instances for differences as well as for similarities in the two constitutions, since some American provisions were deemed to have worked badly and others were considered to be unsuited to Australian or imperial conditions.

It follows, then, that the Australian Constitution was not, as was frequently charged by the enemies of federation or of the particular terms of union proposed, a mere "slavish copy" of an American model. The framework of government which was finally adopted represented the work, spread over a decade, of the ablest and best trained Australians, meeting four times in convention, and benefiting from the deliberate criticism of the six colonial parliaments, of the newspapers, of technical experts, and of some interested English authorities. If the final result resembled any other document, similarity of conditions and needs, together with a previous treatment which appeared to be nothing short of masterly, was responsible. Each detail was considered critically and repeatedly—anything but slavishly.

Finally, the United States was not alone in furnishing federal and other constitutional precedents. The government of England and the constitutions of the Australian colonies, modelled, of course, on that of the mother country, furnished the basis from which the Australians started and on which they insisted upon building. The Canadian union, formed,

like the Australian, within the Empire, was studied carefully and referred to constantly, although in the end the precedents provided by the American republic appeared to be better adapted to Australian needs, and were accordingly more often followed. Switzerland, the German Empire, and Norway were referred to occasionally, chiefly in connection, respectively, with the organization of the executive and the referendum, the composition of the senate, and deadlock provisions.

2. THE FEDERAL LEADERS

The important figures in a movement spread over so many years and so much territory as was Australian federation were necessarily numerous. Nearly eighty men participated in the 1891 and 1897-98 conventions, and many of these were far less influential than others who did their work elsewhere. The premiers and the convention orators were naturally most conspicuous, but although these and other convention members were the outstanding leaders of popular opinion, many newspaper editors, members of the colonial parliaments, organizers of federal associations, and now and then an under-official, a cartoonist, or a statistician, rendered invaluable service.

Many of the leaders were excellently qualified for their rôle, and if others were not, the sum of individual experience was nevertheless impressive. Over half of the convention delegates were not native Australians but had been born in some other part of the Empire;[1] a considerable number had been trained in English or Irish universities. Many others had visited England, some in an official capacity which had brought them into close contact with the Imperial Govern-

[1] 55 per cent. Farrand found that one-sixth of the members of the Philadelphia Convention were not native-born. Farrand, *Framing of the Constitution*, p. 39.

ment. A few had traveled in Canada and the United States. A large proportion—about two-fifths [1]—were lawyers. All were active in Australian politics and possessed some first-hand knowledge of governmental machinery.

Sir Henry Parkes, the New South Wales Premier, who in 1889 initiated the movement which finally achieved union, was born and grew up in England,[2] returning there once as New South Wales Immigration Commissioner and again, in 1881, as Premier. He returned from his second visit by way of the United States and had an opportunity to observe briefly the conduct of government in Washington. Largely self-educated, successively artisan, editor, and professional statesman, he made his contribution through initiative and the indication of the scope and general nature of the prospective federation rather than in detail and in drafting. In his appeals to British precedent he was inclined to be emotional rather than scholarly, and his references to Canada and the United States revealed more oratorical skill than real grasp of history and of institutions. Sir Henry did implant, however, the ideal of an Australian union on the scale of the great American federations, and he succeeded in kindling in New South Wales, a colony indispensable to such a union, a federal flame which, though it flickered at times, never quite died out.

Mr. (subsequently Sir) Edmund Barton,[3] successor to

[1] 42 per cent.

[2] Born in Warwickshire in 1815; left self-dependent at eleven; emigrated to New South Wales in 1839; elected to the Legislative Assembly in 1854; Immigration Commissioner in England 1861-1863; entered the New South Wales ministry, 1866; Premier, 1872-1875, 1877, 1878-1882, 1887-1889, 1889-1891; K. C. M. G., 1877; G. C. M. G, 1888; defeated for the Assembly, 1895; died 1896.

[3] Born at the Glebe, Sydney, in 1849; M. A., University of Sydney, 1870; admitted to the bar, 1871; Q. C, 1889; sent to the Legislative Assembly for the University, 1879; Speaker, 1883-1887, Attorney-General

Parkes as leader of the federal movement in New South Wales and, as it turned out, in Australia, contrasted strongly with the older man. A full generation younger, born in New South Wales, university-trained, a barrister, he was an able politician, but distinctly less at home in rough-and-tumble politics than was Sir Henry. The federation movement forced him to shake off a tendency to indolence, called forth his splendid oratorical gifts and his great intellectual power, and inspired him to give his best even in the discouraging years following the defeat of the Parkes program in New South Wales. He became a keen student of federation and acquired, as the movement advanced, a wide and in some respects a deep knowledge of federal constitutions, especially that of the United States At the end he stood out as the greatest of the federation leaders, the man to whom the launching of the new government must be entrusted. Not the least of his contributions was an ability to understand the fears of the small states and to reconcile the interests of his own New South Wales, wealthy, populous, and conscious of its own prestige as parent colony, with the powerful senate and the federal principles of the United States Constitution, a statesmanship to which not all of his New South Wales colleagues were able to rise.

Two men impressed their view indelibly upon the new constitution in spite of early retirement from the deliberations of conventions. Sir Samuel Walker Griffith,[1] Premier of

1889, 1891-1894. Subsequently first Prime Minister of the Commonwealth, 1901-1903. P. C, 1901; K. C. M. G., 1902; Justice of the High Court, 1903-1920; died, 1920.

[1] Born in Wales in 1845, the son of a dissenting minister who removed to Australia in 1853; B. A., University of Sydney, 1863; M. A., 1870; admitted to Brisbane bar, 1867; Q C., 1876; elected to Parliament, 1871; Attorney-General, 1874; Premier, 1883-1888, 1890-1893; delegate to the Colonial Conference at London, 1887; Chief Justice of Queensland, 1893-1903. Subsequently first Chief Justice of the Commonwealth High Court, 1903-1919; died, 1920, K. C. M. G., 1886; G. C. M. G., 1895; P. C., 1901.

Queensland, and chief spokesman for that colony at the Melbourne Conference of 1890 and at the Sydney Convention of 1891, was, like Parkes, born in Great Britain, but like Barton he was younger, a graduate of Sydney University, and a barrister. Like both he had long been active in the political life of his colony. He had travelled to Europe on a fellowship following his university career, and he visited England as Premier at the time of the Colonial Conference of 1887. Sir Samuel was a remarkably keen lawyer, a profound student of constitutional law, and a draftsman of recognized ability He was one of the leading authorities on the American Constitution, for which he had, and frankly expressed, the greatest admiration—an attitude naturally strengthened by his position as representative of one of the smaller colonies. His prestige, learning, and ability in expression, did much in 1891 to defeat Parkes' desire for the Canadian type of federation, and his position as chief draftsman accounts largely for the reproduction in the 1891 Constitution Bill of American institutions and even phraseology. Sir Samuel's almost immediate retirement to the bench, and the failure of Queensland to send representatives to any of the sessions of the later convention, did not prevent him from exercising considerable influence through an extensive correspondence and his widely published writings.

Mr. A. Inglis Clark was a native Australian,[1] like Sir Samuel Griffith a lawyer of great ability and learning, and, again like Sir Samuel, a great admirer of American political institutions, of which he was, perhaps, an even closer student

[1] Born at Hobart in 1848, the son of an iron founder and engineer; admitted to the bar, 1877; elected to Parliament, 1878; Attorney-General, 1887-1892, 1894-1897, delegate to the Federal Council, 1888, 1889, 1891. He retired from politics soon after the Sydney Convention of 1891, and served as Justice of the Tasmanian Supreme Court, 1898-1907. He was subsequently the author of *Studies in Australian Constitutional Law*. He died in 1907.

He had visited America and was especially well-informed in respect to American constitutional law and the judicial system. His connection with the small colony of Tasmania no doubt encouraged him to advocate the type of federation adopted by the United States, which he did forcefully and effectively, stressing the judiciary as well as the senate. Mr Clark's legal learning and interest in courts gained him the chairmanship of the Judiciary Committee in 1891, a position which enabled him to write the American organization of courts, for which he had such high regard, into the Constitution Bill drafted in that year.

If Barton must be accorded the rank of greatest of the federal leaders, it can only be after a careful weighing of the services of Mr. Alfred Deakin,[1] and it must be acknowledged that if Barton's work was the more important, the reason lay as much with the situation in New South Wales and in Victoria as with the men. In ability as a speaker, in personal influence, as a student of federal problems, in breadth of view and in whole-souled devotion to the cause of federation, Deakin was second to none. If Barton loyally stood by federation in dark times in New South Wales, and was in great part responsible for bringing that large colony to a truly federal attitude, Deakin performed these identical services in the large colony of Victoria. The careers of the two men were strikingly similar in other respects.

Like Barton, Deakin was born in Australia, was educated in an Australian university, was a lawyer. Like Barton he

[1] Born in Melbourne, 1856; University of Melbourne; admitted to the Melbourne bar, 1877; on the editorial staff of *The Age* and *The Leader*; elected to Parliament, 1879; member of the ministry, 1883-1886, 1886-1890; in the United States and Mexico in 1885 investigating systems of irrigation, and later in India on the same mission; delegate to the Colonial Conference at London, 1887; delegate to the Melbourne Conference, 1890; delegate to the Federal Council, 1889. Subsequently three times Prime Minister of the Commonwealth. Died, 1919.

had been long active in the political life of his colony without becoming head of the government. Both men were noted speakers, both were members of the conventions of 1891 and 1897-98, both represented their colonies in London during the passage of the Constitution Bill through the Imperial Parliament. Both became Prime Ministers of the Commonwealth. If anything, Deakin's background was the broader, his reputation as a speaker the greater, and his career the more distinguished. His newspaper experience and connection were valuable, he had travelled extensively in the United States, he had attracted favorable attention at the Colonial Conference at London in 1887, he had represented Victoria in the Federal Council, and he had been a delegate to the Melbourne Conference in 1890.

Deakin represented a large colony and was generally found supporting its views and interests, but he was early convinced of the necessity for concessions to the "small" states. Recognizing the extent to which Australian and American needs and conditions were similar, he supplemented his first-hand impressions of the United States with studies sufficiently broad and deep to make him one of the best informed of the several keen students of American precedent who were present in the sessions of 1897-98. Breadth of view and of sympathy, and a personal charm for which he was distinguished, fitted him for the rôle of peace-maker, and it was in that capacity that he rendered some of his greatest service, although when occasion demanded he could be firm, vigorous, and a hard fighter

As has been suggested, the extent to which American precedent was followed, especially in regard to the powers of the federal parliament and the constitution of the senate, was due to the small states. In some instances provincialism and recognition of local interests, combined with stubbornness, seems to account for the attitude of delegates, but

the small colony representatives included several able students of constitutional history and law, in addition to Griffith and Clark, who were quite capable of supporting their views with principles and precedents. The most influential of these was perhaps Sir Richard Baker of South Australia

Born in Adelaide, Mr. Baker [1] (he was knighted in 1895) had been sent to Eton and to Cambridge, and had been called to the bar at Lincoln's Inn. He then returned to South Australia where he won early distinction in the familiar combination of law and politics When the Sydney Convention was called in 1891, he prepared a *Manual of Reference to Authorities for the Use of Members of the National Australasian Convention* . . . , a work which proved valuable both to the delegates and to the small states cause which Baker vigorously championed He and Griffith proved to be the most thorough and persistent, as well as the ablest, of the advocates of state rights, fighting all proposals of checks on the senate and of deadlock provisions (provisions, that is, to end disagreements between the two houses of Parliament) at every stage of the deliberations, and prepared even to sacrifice responsible government when that seemed to stand in the way of their desires. The precedents which they sought were of course found in America. These were used to full advantage. Since Griffith disappeared early from the convention floor, it was Baker, with strong support from Sir John Downer and Mr. Symon, both also from

[1] Born in Adelaide in 1842; B. A., Cambridge, 1864, M A., 1870; elected to the Legislative Assembly, 1868 (the first native Australian to become a member); appointed to the Legislative Council, 1877, remaining until he entered the Commonwealth Senate in 1901; Attorney-General, 1870-1871; Minister of Justice and Education, 1884-1885; in England on official business, 1885; a member of both the 1891 and 1897-98 conventions. Created C. M. G., 1886, K. C. M. G, 1895. Subsequently first President of the Federal Senate I have been unable to ascertain that he ever visited the United States.

South Australia, who advanced arguments and drew the fire of the large states leaders.

Mr. (later Sir Josiah) Symon,[1] colleague and able associate of Baker in furthering the interests of the small states, was a lawyer, an effective debater, and another thorough student of federal problems and precedents. As chairman of the judicial committee of the 1897-98 convention, he was able to mould the system of courts to some extent, but although he was not as devoted an admirer of the American judiciary as was Clark, the divergence from the 1891 Bill was confined to the subject of appeals to the Privy Council and to phraseology

The premiers of the six colonies necessarily played important parts in the federal movement, though they seldom displayed the brilliance and grasp of federal principles shown by Barton and Deakin. In general the premiers supported federation sincerely and consistently, although responsibility to a parliament and regard for a vigilant opposition rather moderated their enthusiasm and tempered their utterances Mr. (later Sir George) Dibbs of New South Wales, successor as Premier to Sir Henry Parkes, though a member of the 1891 Convention, definitely opposed the terms then agreed upon, and although no longer in power, he took a similar attitude toward the work of the later convention. Mr. (presently Sir Hugh) Nelson's Government in Queensland failed to secure representation for that colony in the 1897-98 sessions, but nevertheless can scarcely be counted as opposed to the movement Mr. (later Sir George) Reid and Mr. (later Sir William) Lyne of New South Wales were

[1] Josiah Henry Symon, born in Scotland in 1846; emigrated to Australia in 1866; admitted to the South Australian bar, 1871; Q. C., 1881; elected to the Assembly, 1881, and Attorney-General the same year; President of the South Australia Federation League, 1897. Subsequently elected to the first Commonwealth Senate, where he became first leader of the Opposition; K. C M. G., 1901

certainly not federationists first, last, and always, but they were vigorous champions of union at the end, and rendered important services.

Only one of the premiers, Mr. (presently Sir John) Forrest of Western Australia, was in power throughout the ten years of the movement. In all the other colonies there were changes of administration between the 1891 Convention and Reid's revival of negotiations, and again between the end of the 1897-98 sessions and the passage of the Constitution Bill through Parliament. A man of action rather than a student, blunt and intolerant of lengthy discussions, one of the few outstanding delegates not legally trained, Sir John Forrest [1] was content to leave the details of drafting and the citation of precedents to others As representative of the newest and least firmly established of the colonies, he declined to consider entering a union dominated by the large states, and he consistently supported the South Australian proposals. He was skeptical of the ability of Western Australia to join with the wealthier and more populous colonies, for a time at least, on equal terms, and accordingly sometimes took a stand so independent and even arbitrary as to sting the large states delegates into threatening Western Australia with exclusion from the union. In the end, after winning some special concessions for his colony, Sir John

[1] Born in Western Australia in 1847, a surveyor and an explorer of distinction; a member of the Executive and Legislative Councils before the granting of responsible government; a delegate to the Colonial Conference in 1887; elected to the first Legislative Assembly in 1890, first Premier and Treasurer, and continuously in power until his acceptance of office in the first Commonwealth ministry, delegate to the 1891 Convention at Sydney; member of the Federal Council in 1893, 1895, 1897, 1899; created K. C. M. G., 1891; Privy Councillor, 1897. Subsequently first federal Postmaster General, then successively Minister of Defence, Minister for Home Affairs, and Treasurer; G. C. M. G., 1901, and later Baron Forrest of Bunbury. He had visited Canada but not, so far as I can discover, the United States. He died in 1918.

was able to give his personal support to the Constitution Act, though as Premier and party head he frankly admitted that temporary hardship would result from federation, and left his followers free to vote as they chose.

Mr. Kingston,[1] Premier of South Australia during the convention of 1897-98, was a distinguished and influential federalist from 1891 on. As a small state representative he was a supporter of a strong senate, but when the insistence of the small states on coördinate powers for the two houses, even in finance, threatened to disrupt the convention, Kingston accepted the limitations demanded by New South Wales and Victoria and, with some support from individual Tasmanians, prevented the threatened collapse of the proceedings. As leader of the vigorous democratic party of South Australia, Kingston was inclined to support such features of the Commonwealth Bill as popular election of senators and the reference of the completed Constitution Bill to the electors. As a lawyer of experience and a draftsman of ability, he was a member of the drafting committee of the 1891 Convention, and as a distinguished representative of his colony and an authority on the final Bill, he was sent to London, after his retirement from the premiership, as one of the federal delegates during the passage of the Constitution through Parliament. Though not as close a student of previous federations as many of the other delegates to the conventions, Kingston was well-informed and well-qualified for the work. Like the other premiers he was in London for Queen Vic-

[1] Charles Cameron Kingston, born in Adelaide in 1850, the son of Sir George Kingston, speaker of the Legislative Assembly; admitted to the bar, 1873, Q. C., 1889, elected to Parliament, 1881, Attorney-General, 1884-1885, 1887-1889; Chief Secretary, 1892-1893, Premier, 1893-1899; delegate to the conventions of 1891 and 1897-98; Federal Delegate to London, 1900; P. C, 1897. Subsequently first federal Minister of Trade and Customs and member of the first House of Representatives; died, 1908

toria's Jubilee in 1897 and, like most of them, he returned by way of the United States.

Sir Edward Braddon,[1] Premier and chief spokesman for Tasmania during the sessions of 1897-98, a native of England, had settled in Tasmania after his retirement from the Indian civil service and army. He had been Tasmanian Agent-General in London from 1888 to 1893, and had represented the colony in several sessions of the Federal Council. His position and wide experience commanded respect, but he was elderly, in frail health, not a lawyer, and not a close student of federal problems. Together with the other Tasmanian delegates he stood for a senate strong enough to preserve state rights, but his greatest activity was in connection with the financial question, in which his not too prosperous colony was vitally interested

Sir George Turner [2] of Victoria, the youngest of the premiers, did not enter parliament until 1889, and took no important part in the federal movement until he became head of the government in 1894. A lawyer and financier, a hard worker, always practical, wielding influence through logic and common sense rather than through personal magnetism, he occupied himself chiefly and most effectively with the questions of finance and river control, usually leaving difficulties of drafting and the collection of precedents to his brilliant colleagues, Deakin and Isaacs. As Premier of a

[1] Born in England in 1829; served in India in the Civil Service and army, settled in Tasmania in 1878; member of the Legislative Assembly, 1879-1888 Agent-General in London, 1888-1893, Premier, 1894-1899; delegate to the Federal Council, 1888, 1895, 1897; K. C. M. G, 1891; P. C, 1897 Subsequently member of the federal House of Representatives, died in 1904.

[2] Born in Melbourne in 1851; admitted to the bar, 1881; member of the Legislative Assembly, 1889-1901; member of the ministry, 1892-1893; Premier and Treasurer, 1894-1899; delegate to the Federal Council, 1895, 1897; K. C. M. G, P. C., 1897. Subsequently first Commonwealth Treasurer; died in 1916.

large state Sir George naturally favored checks on the power of the senate, and he was especially vigorous in supporting a national referendum in case of deadlocks. He accepted the necessity for equal state representation in the senate, however, and was generally reasonable in his attitude toward both the small states and New South Wales.

Mr (subsequently Sir) George Reid, of New South Wales, was variously the bad boy, the vigorous promoter, the candid friend, and the ardent champion of federation. Always conspicuous and to be reckoned with, never dull or conventional, seldom apparently consistent, delighting in controversy, he at various times won the hearty condemnation of the small colonies, of the large colony of Victoria, of federalists, of anti-federalists, and of all newspapers of whatever views—but never of the parliament and electorate of New South Wales. And yet, whether he moulded or, as might be maintained, rather registered the public opinion of his colony, and however much he may have tried the patience of the other premiers and federal leaders, he was invaluable in advertising federation, in arousing and perhaps in educating the people. Mr. Reid [1] was a native of Scotland, but he had been brought to Australia as a child. After several years in the New South Wales civil service he had been admitted to the bar, had been elected to parliament, had finally succeeded Parkes as leader of the Free Trade Party,

[1] Born in Renfrewshire in 1845, the son of a minister; arrived in Victoria in 1852, in the New South Wales civil service, 1864-1878; secretary to the Attorney-General, 1878, admitted to the bar, 1879, Q. C, 1898, elected to Parliament, 1880; Minister for Public Instruction, 1883-1884, Leader of the Free Trade Party, in opposition, succeeding Sir Henry Parkes, 1891, Premier, 1894-1899; in England for the Jubilee, 1897, returning by way of America. Subsequently elected to the first federal House of Representatives, and first Leader of the Opposition, and then Prime Minister; first federal High Commissioner in London, 1910-1916, and then member of the Imperial Parliament; P. C., 1897; K C. M. G, 1909, G C M. G, 1911; died in 1918.

and had become Premier in 1894. Of the position of New South Wales—populous, wealthy, the parent colony, quite indispensable to federation—Reid was quite aware, and he was not disposed to sacrifice any of what he considered to be her interests. His greatest service, other than reviving the movement and insisting that it be placed upon a popular basis, was in criticizing the proposals of others—as exasperated delegates sometimes pointed out. His slowness to accept compromises which he considered slipshod undoubtedly resulted in improved solutions of the problems of finance, river control, deadlocks, and the federal capital

Mr. (later Sir William) Lyne,[1] who in 1899 succeeded Reid as Premier, and who continued in office while the Constitution was enacted in London, was a member of the 1897-98 Convention and a consistent supporter of the large states view. He was not, however, especially influential except in finally committing the New South Wales Opposition to federation. He faithfully supported the demand for the enactment of the Constitution Bill without amendment by the Imperial Parliament, as did the new Premiers of Victoria, South Australia, and Tasmania.

Queensland's failure to participate in the 1897-98 Convention deprived her leaders of the opportunity greatly to influence the later movement. Sir Hugh Nelson, Premier when the convention was called, disapproved of the popular election of the delegates and was far from vigorous in his

[1] William John Lyne, born in Tasmania in 1844, variously a resident of Tasmania, Queensland, and New South Wales, a grazier; elected to the New South Wales Legislative Assembly, 1880; a member of four protectionist ministries after 1885; successor to Dibbs as head of the Protectionist Party; merged his party with the Barton Federalists in 1898, and retired as Opposition Leader in Barton's favor; Premier and Colonial Treasurer, 1899-1901; was tendered the first premiership of the Commonwealth but failed to form a strong government through Barton's refusal to accept office under him; first federal Minister for Home Affairs, and later Minister for Trade and Customs; K. C. M. G., 1900.

attempt to secure a representation. Sir Horace Tozer, Acting-Premier during Sir Hugh's somewhat extended absence in England, attempted to pass a federal enabling bill but failed. Mr. Byrnes, who succeeded to the premiership on Sir Hugh's retirement, promptly gave his support to federation, and Mr Dickson, who became head of the government upon Mr. Byrnes' sudden death, continued the support and secured Queensland's ratification of the Constitution Bill. Dickson also, following his retirement from power, represented his colony in London during the passage of the Bill through Parliament. Save, however, for Griffith, whose activities have already been mentioned, no Queenslander seems to have affected the drafting of the final constitution.

Several other members of the Conventions made important contributions. Sir John Downer of South Australia, a delegate to both the 1891 and the 1897-98 Conventions, and a member of the drafting committee of the latter body, was one of the most uncompromising of the defenders of state rights. Sir John[1] was a lawyer, had had a long and varied experience in the political life of his colony, had attended the 1887 Colonial Conference in London, and was able to draw effectively on American history and precedent for his arguments.

Sir John Bray,[2] also of South Australia, educated in part in England, like Sir John Downer a lawyer and distinguished in colonial politics, had convened and presided over the first

[1] Born in Adelaide in 1844; called to the bar in 1867; Q. C., 1878; elected to the Legislative Assembly, 1878; Attorney-General, 1881-1884, 1885-1887; Premier, 1885-1887, 1892-1893; delegate to the Colonial Conference, 1887; K. C. M. G, 1887; a member of both federal conventions. Subsequently a federal Senator; died in 1915.

[2] Born in Adelaide in 1842; educated in Adelaide and England; admitted to the bar, 1870; elected to parliament, 1871; Attorney-General, 1876-1877, and later Chief Secretary, and then Speaker of the Legislative Assembly and Colonial Agent in London; K. C M. G., 1890; died in 1894.

conference of the Australian Natives Association at Melbourne in 1890, which drafted an outline of a federation. Sir John had recently been in England and America, and was an able and well-informed member of the first of the federal conventions.

Another prominent South Australian, a member both of the 1891 and the 1897-98 Conventions, was Dr (subsequently Sir) John Alexander Cockburn [1] He supported the small states and South Australian position consistently, but he also stood out in the 1891 Convention because of his liberal views on social issues and his strong belief in democracy; he frequently supported Sir George Grey, whose ideas were much too radical to please most members of the Convention.

These vigorous champions of the small states point of view were matched in ability and eloquence by several large states delegates not yet mentioned Mr. Richard Edward O'Connor [2] of New South Wales was not only a forcible debater in the sessions of 1897-98 but a loyal supporter of federation in the none too sympathetic parliament and political meetings of his colony. With Mr. Wise he consistently sup-

[1] Born in Scotland in 1850; King's College, London; M. D, London University, 1874; moved to South Australia in 1875; a member of the Assembly, 1884-1887, 1887-1898, Minister of Education; Premier, 1888-1889; Chief Secretary; Minister of Education and Agriculture; Agent-General for South Australia in London, 1898-1901; K. C. M. G., 1900 A member of the Melbourne Conference of 1890 He subsequently settled in England and wrote much about Australia, but added little to knowledge of the details of federation

[2] Born at the Glebe, Sydney, in 1851, the son of the Clerk of Parliaments of New South Wales, B A, University of Sydney, 1871, M. A., 1873; called to the bar, 1876; Q C., 1896, Clerk of the Legislative Assembly, 1871-1873; an editorial writer, appointed to the Legislative Council, 1888; Minister of Justice, 1891-1893; Solicitor-General, 1893. Subsequently elected to the first federal Senate, where he became Vice-President and Leader; appointed to the Commonwealth High Court in 1903; died, 1912.

ported Barton and the Constitution Bill as drafted by the Convention, and with them he strove either to secure the acceptance of the Bill in New South Wales over the opposition of Reid or to force Reid to accept and support the measure.

Mr. B Ringrose Wise,[1] also a New South Wales barrister of note, and something of a journalist as well, had been in touch with the federation movement from 1891 on. He took a prominent part in the debates of the 1897-98 Convention, generally supporting, moderately, the large state contentions and the views of his colony, especially in the matter of deadlocks. In the stirring campaigns for ratification Wise not only rendered effective service to the Barton program in New South Wales but, like Deakin, journeyed to other colonies to speak for the Constitution Bill. Wise was one of the few participants in the federal movement who left an account of it.

Mr (subsequently Sir) Isaac Alfred Isaacs,[2] the Victorian Attorney-General, a lawyer of great learning and brilliance, was one of the most influential members of the 1897-98 Convention. He participated in the debate on every important question and invariably threw upon them the light of the experience of Australia, England, and America. His com-

[1] Born in Sydney in 1858, the son of Judge Edward Wise; Rugby; B. A, Queen's College, Oxford, called to the bar in the Middle Temple in 1881, and in 1883 to the bar of New South Wales, Q. C, 1898; elected to the Legislative Assembly, 1887; defeated, 1895; Attorney-General under Parkes, 1887-1888, and again 1899-1901, 1901-1904, a writer on industrial, political and other questions; present at the Hobart Conference in 1895, though not as a delegate. He died in 1916.

[2] Born in Melbourne in 1855, LL.M, University of Melbourne, 1880; elected to parliament in 1892; Solicitor-General and later Attorney-General; Acting-Premier in 1897 and in charge of the Adelaide 1897 Bill in the parliamentary discussions in Victoria Subsequently a member of the federal House of Representatives, federal Attorney-General and Justice of the High Court, 1906- ——; P. C, 1921; K. C. M. G., 1928.

mand of history and the fullness of his knowledge of law and of judicial decisions, especially of the United States, while trying to non-legal delegates and to his opponents, carried weight and conviction. His erudition no doubt joined with the necessities of the debates in stimulating a close study of American legislation and court decisions, fields in which Barton, Deakin, Symon, and Higgins were able to follow him closely. Isaacs also rendered valuable service in the Victorian Parliament and during the campaigns for ratification.

Several other delegates to the conventions were, of course, very influential in the movement. Perhaps it will suffice here, however, to mention Sir Philip Fysh, Premier of Tasmania in 1891 and Federal Delegate to London in 1900, Mr. (later Sir) William McMillan of New South Wales, a member of both conventions, Mr. (later Sir) Frederick William Holder, Treasurer of South Australia at the time of the later convention, all of whom were primarily interested in financial questions, Mr. (later Sir) John Winthrop Hackett of Western Australia, a member of both conventions, and a supporter of federation in the journal of which he was part proprietor, Dr. (later Sir) John Quick, the Victorian journalist and barrister who proposed the revival of the federal movement on a popular basis, and, finally, Mr. William Arthur Trenwith, a leader, at the time of the 1897-98 Convention, of the Victorian Labour Party, who gave efficient support to the federal cause.

3. AUSTRALIAN FEDERAL MOVEMENTS BEFORE 1889

When, in 1889, Sir Henry Parkes brought about the first of the several conferences and conventions through which Australian federation was finally achieved, he was initiating not a new movement but rather a new phase of a movement which already had a considerable history.[1]

[1] The story of the early phase of Australian federation is fully and

Even before the process of dividing Australasia into several colonies had been completed, vigorous demands were heard for united political action. Van Dieman's Land, later Tasmania, was separated from New South Wales in 1825; Western Australia, never a part of New South Wales, was annexed to the Empire in 1829; South Australia, similarly never a part of New South Wales politically,[1] was constituted a colony in 1836, and New Zealand, annexed to the Empire in 1840, was made a separate colony in the same year. Before Victoria and Queensland were set off from New South Wales, in 1850 and 1859 respectively, two federal programs had already been advanced.

In the American colonies the incentive for the early attempts at union was defence, an influence which in Australia appeared late and then only somewhat incidentally. There the impetus came from an intercolonial tariff war which, in 1846, led Mr. (later Sir) Edward Deas Thomson, then Colonial Secretary of New South Wales, and Governor Fitzroy of that colony, to suggest a considerable centralization in the control of intercolonial legislation The dangers of the lack of such control were abundantly demonstrated by the increasing bitterness of tariff wars during the next four decades.

The Deas Thomson proposal was incorporated into the otherwise doctrinaire federation program advanced by Earl Grey during his term as Secretary of State for the Colonies. Among the several reforms and changes which he proposed in 1847 was the establishment of a general Australian

carefully told by C. D. Allin in *The Early Federation Movement of Australia*, Toronto, 1907. A briefer account is given in the introduction of Quick and Garran, *Annotated Constitution of Australia*, pp. 79-115, and a rapid sketch may be found in Egerton, *Federations and Unions in the British Empire*, pp. 40-50. Many of the documents are printed in Tasmanian *Journals and Papers of Parliament*, 1891, XXIII, number 112.

[1] Set off from New South Wales in 1834; settled in 1835

Assembly which should have control over such common interests as customs, mail, railroads, and other communications.[1] Though the plan was promptly modified by Earl Grey because of the objections raised against it, then considerably elaborated in the report of a distinguished committee,[2] and later modified still further in Parliament, it met only with indifference or with active hostility in Australia, and in Parliament the federal provisions had finally to be withdrawn. These efforts to impose union upon the colonies from without lacked a popular basis and, however statesmanlike in other respects, were premature. Earl Grey nevertheless proceeded to commission the governor of New South Wales to be governor-general of the Australian colonies, reducing the heads of the other colonies to the rank of lieutenant-governor, apparently intending to make the governor-general the core of the desired federation.[3] Again the effort came to nothing; the governor-general's commission was allowed to expire in 1861. The home government had learned discretion, and now awaited some unmistakable sign from Australia.

[1] Earl Grey's proposal is quoted in part in Quick and Garran, *op. cit.*, p. 81 *et seq.*

[2] The Committee was composed of Earl Grey, Colonial Secretary, Mr. Labouchere, President of the Board of Trade, Lord Campbell, Chancellor of the Duchy of Lancaster, Sir James Stephen, Permanent Under Secretary for the Colonies, and Sir Edward Ryan, former Chief Justice of Bengal. Allin, *op. cit*, p. 93 *et seq.* The entire Grey program is discussed in detail in Allin, *op. cit.*, Chapter II. The Report of the Committee for Trade and Plantations of the Privy Council, dated May, 1849, may be found in *Great Britain Parliamentary Papers* (hereafter cited as *G. B. P. P.*), 1849, vol. xxxv, p 33, and in New South Wales *Votes and Proceedings of the Legislative Council* (hereinafter cited as N. S. W. *V. P. L. C.*), 1849, vol. i, p. 704; it is reprinted in Egerton, *Federations and Unions in the British Empire*, pp. 169-184.

[3] The commission and instructions issued to Sir Charles Fitzroy, the first Governor-General, are printed in *G. B. P. P.*, 1851, vol. xxv, p. 40, and in N. S. W. *V. P. L. C.*, 1851, p. 17.

No such sign appeared, but a few vigorous enthusiasts kept the ideas of union alive. Deas Thomson was soon joined by the able and influential William C. Wentworth, the "father" of responsible government in New South Wales,[1] the Launceston *Examiner* supported the federation idea strongly, and the Reverend Dr. John Dunmore Lang coupled federation with his agitation for independence and insisted upon a hearing for both.[2] Presently the *Sydney Morning Herald,* the Melbourne *Argus,* and the *South Australian Register* added their powerful aid—and, in the end, newspapers assumed the leadership of the movement for a time.

Allin points out [3] that the gold rush increased intercolonial trade and interests, and tended to break down old loyalties, that different customs, bad postal service, and varying systems of land sales were constant annoyances, that divided capital and financial control delayed the development of resources, and that editorials could insist with increasing force that Australia was geographically, socially, racially, religiously, and economically a unit. Presently the possibility of French intervention in the Pacific suggested a new need for unity.

Little real progress, however, was made. Wentworth organized the "General Association for the Australian

[1] The federal recommendations of Wentworth's constitutional committee of the New South Wales Parliament, 1853, are quoted in Quick and Garran, *op. cit.,* pp. 90-91 from *G. B. P. P.,* 1854, vol. xliv, p. 15, and N. S. W. *V. P. L. C.,* 1853, vol. ii, p. 119. A constitutional committee of the Victorian legislature, also in 1853, mentioned federation but made no definite proposals; see *G. B. P. P., loc. cit.,* p. 73. The home government did not act upon either set of suggestions.

[2] See his *Freedom and Independence for the Golden Lands of Australia,* 1852 (or *The Coming Event; or Freedom and Independence for the Seven United Provinces of Australia,* 1870).

[3] *Op. cit.,* pp. 294-295.

Colonies" at London in 1855, and in 1857 presented a new plan of union to the home government,[1] which declined to act upon the recommendations, and the reception accorded them in Australia gave little evidence of popular interest. Lang continued his agitation, but his association of federation with separation and republicanism discredited proposals for federation among conservative citizens.

The work of Gavan Duffy proved to be more soundly based, though hardly more successful. Elected in 1857, soon after his arrival from Ireland, to the first Assembly of Victoria, he secured in that year the appointment of a select committee which reported[2] strongly in favor of immediate federation and recommended a conference of delegates from all the colonies to draft a constitution The Victorian Parliament adopted the report and had it transmitted to the other Australian governments. The New South Wales Parliament, under the leadership of Deas Thomson, considered the Wentworth and the Duffy programs together. The action of the Council was favorable, but that of the Assembly reflected the colony's jealousy of the rising prestige of Victoria. South Australia and Tasmania received the Duffy suggestions favorably, and both went so far as to appoint delegates to the proposed conference. Their action marked the highest point reached by the early federal movement. The continued efforts of Gavan Duffy brought no response from New South Wales, were discouraged by the new colony of Queensland, and were less heartily supported than at first by South Australia. At the intercolonial tariff conference called by South Australia in 1863, the question of federation was not even discussed.

[1] For Wentworth's *Memorial* and the ensuing correspondence see *G. B. P. P.*, 1857, 2nd session, vol. xxviii, p 1, and Allin, *op. cit.*, pp. 303 *et seq.*, 424 *et seq.*

[2] See Allin, *op. cit.*, p. 326 *et seq.* for the report.

Allin [1] attributes the failure of the early movement to jealousy and suspicion, especially between New South Wales and Victoria, to old grievances which were nursed by provincialists, to commercial and economic rivalry, to desire for complete autonomy, to decentralizing tendencies which only better communications could check, to political accidents which prevented simultaneous action by all the interested governments, and to lack of popular enthusiasm. Federation had not yet attained standing in practical politics.

There is little in this early movement which recalls the course of union in the American colonies. The proposals of Deas Thomson and Wentworth could be compared with Franklin's plan of union of 1754, but the Australians made no such comparisons at the time, and the powerful incentive which accounted largely for the New England Confederation, the administrative reforms of James II, and the Albany Plan—military necessity—was quite absent in the early Australian proposals for union [2] In this early period the leader who seems to have been most influenced by American precedent was Dr. Lang, whose extreme willingness to follow the example of the American colonies repelled many of his compatriots. The more conservative Reverend John J. West, in writing the able "John Adams" articles in the *Sydney Morning Herald,* also expressed admiration for the United States system of government and proposed to make it the model for Australia.[3]

Allin calls attention [4] to the close resemblance of some of the recommendations of the 1849 Committee of the Board

[1] *Op. cit.*, p. 409 *et seq.*

[2] Nor was the desire of the home government for such administrative efficiency as the Andros reforms were expected to secure a motive for Earl Grey's project.

[3] Allin, *op. cit.*, p. 289.

[4] *Ibid.*, p. 113. See also p. 124 *et seq.*

of Trade to provisions of the United States Constitution, notably in enumerating the powers of the central government and in establishing uniform customs and a federal judiciary, but he characterizes the resemblances as merely superficial.

The drafting of the Australian Colonies Government Bill of 1850 called forth a few strong but fruitless endorsements of the American political organization as adaptable to Australia.[1] Allin suggests that the proposal in Wentworth's *Memorial* of a constitutional convention shows the growing influence of American precedent in the Australian movement.[2] The debates in the New South Wales legislature in 1857 on the Wentworth and Duffy programs foreshadowed slightly the parliamentary discussions of the later movement in a few extended references to the experience of the United States,[3] but federation was not yet an issue so pressing that any save a small number of enthusiasts had made any study of it, and even they had not gone far.

The intercolonial conference of 1863 failed to solve the increasingly bitter problem of colonial tariffs but it did establish a precedent for future conferences. Legislation and compulsion were of course impossible, but negotiation, agreements and some cooperation did result, opportunities for suggesting more effective organization were offered, and not infrequently the disadvantages and inadequacy of such a means of transacting intercolonial business were made apparent.

At such a conference in 1867 Mr. Henry Parkes, then Colonial Secretary of New South Wales, declared that the time had come for some form of federation. No action was then taken, but the system of conferences proved inadequate

[1] Allin, *op. cit*, p. 175.

[2] *Ibid.*, p. 310.

[3] *Ibid.*, pp. 353-354.

to cope with the tariff problem, attempts to form a customs union failed, and in a conference held in 1880 and 1881 Parkes revived his proposal for a federal council. He submitted a draft bill, which he wished to forward to the British Parliament for enactment, providing for its establishment. In doing so he declared [1] that although Australia was generally considered not yet ready for federation, the colonies felt the need of some federal authority to deal with matters of common concern, and of some institutions which might educate Australians to think in federal terms. He recommended the proposed council as effective within prescribed limits and as leaving the colonies with unimpaired powers. Although the delegates from South Australia and Tasmania accepted the New South Wales bill, it was rejected by the representatives of Victoria, Queensland and New Zealand,[2] and had to be abandoned; the British Government could not be expected to take action in the face of such division in Australia.

The events of 1883 soon revived the project. A banquet held to celebrate the completion of rail connection between Sydney and Melbourne inspired much federation oratory, but even more stimulating was the growing interest of France and Germany in the Pacific. The weakness of divided counsel and action was made apparent in the failure of the colonies to persuade the home government to annex New Guinea, and in 1883, Mr. (later Sir James) Service, the Premier of Victoria, secured an intercolonial conference in which he proposed real and effective federation. The other delegates would not follow him so far, but a draft bill providing for a federal council, framed by Sir Samuel Griffith of Queensland, was adopted. Accepted by the parliaments

[1] His resolutions are quoted in Quick and Garran, *op. cit.*, p 108, and Parkes, *Fifty Years*, vol. ii, p. 336.

[2] The West Australians did not vote.

of all the colonies except New Zealand and New South Wales (where Sir Henry Parkes, as Premier, now opposed the council as weak, useless, and even an obstacle to effective union), the measure was enacted by the British Parliament in 1885.[1]

The Council as constituted was very far from a complete federal government, although provisions were inserted to make its expansion into such a government possible. Entrance was optional, withdrawal possible. No executive or judicial authorities were established, no financial power was granted, and power to legislate was restricted to the specified subjects of relations with the islands of the Pacific and the prevention of the influx of criminals, questions which were important at the moment, and to the relatively unimportant matters of fisheries and various phases of legal administration, such as extradition, where cooperation was desirable. At the request of two or more colonies the Council was authorized to legislate, for those colonies only, on questions of defence, quarantine, patents and copyrights, bills of exchange and promissory notes, and weights and measures, on the recognition of marriage and divorce, naturalization, the status of corporations, and on any others of more than local interest upon which the legislatures could legislate within the limits of their authority, and upon which they deemed common legislation desirable. Provisions for secession and for increasing the number of members from each colony, and a clause permitting the increase of the powers of the Council by the Crown on petition of the colonies, were inserted by the home government.[2]

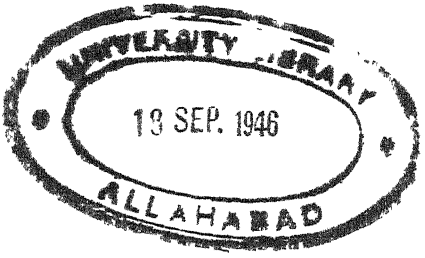
New South Wales refused to enter the Council, and Parkes consistently declined to work through it or to attempt to

[1] 48 & 49 Vict., c. 60.

[2] Federal Council for Australasia Act, *loc. cit.*; Quick and Garran, *op. cit.*, p. 111 *et seq.*

expand it into a more effective union, but Western Australia, Queensland, Tasmania, Victoria and Fiji joined promptly, South Australia in 1888 for a term of two years, which was not then extended, and meetings were held in 1886, 1888, 1891 and then biennially through 1899.[3] In 1894 the number of delegates from each colony was increased from two to five by an order in council at the request of the colonies, who desired to strengthen the Council and increase its importance. Many Australians long believed that union could and ought to be achieved through the Council The uncompromising attitude of New South Wales, however, made such a course impossible, and the Council never succeeded either in dealing conclusively with any matter of importance or in gaining the confidence of the colonies.

[1] Fiji was represented at the first meeting only. The *Official Record of the Debates* of the Federal Council of Australasia, for each of its sessions, has been published.



CHAPTER II

The Australian Federal Movement, 1889-1901

I. Parkes' agitation for federation, 1889-1890

When in 1883, and always thereafter, Sir Henry Parkes refused to accept a council such as he had sponsored in 1880, his critics at home and in the other colonies accused him of inconsistency and unwillingness to support any measure for which the credit was not his alone. He denied the charges, insisting that the time for a weak confederation was past, that a strong federation was needed, and that halfway solutions such as he himself had once recommended were useless, or perhaps even definitely harmful to the cause of real union.[1]

In 1889 Parkes was again Premier of New South Wales. As his political opponents presently pointed out, he had been in office for two years, his hold upon Parliament was very insecure, and a new issue might perhaps prove a powerful aid in maintaining the Free Trade Party in power. Certainly if he ever intended to make federation an issue he could not, at the age of seventy-four and with power slipping from him, afford to wait much longer. Whatever the motive, he chose the moment to propose to the ministries of the other colonies an intercolonial conference on the subject of federation. He suggested the Canadian Constitution as a model. Gillies, the Premier of Victoria, rejected the proposal, but strongly urged that New South Wales enter the Federal

[1] Parkes, *Fifty Years*, vol. ii, p. 337. The fullest and most authoritative accounts of this period are in Wise, *Making of the Australian Constitution*, chapters i-x, and in Quick and Garran, *op. cit.*, pp. 115-150.

Council, which he considered the best agency through which to realize Sir Henry's aims.[1]

Parkes was checked for the moment, but when, in October of 1889, General Sir J. Bevan Edwards published a report [2] on Australian defence in which he advised unified military control, Sir Henry promptly brought up his federal proposals again and more vigorously To a new proposal of a conference to discuss defense Gillies once more returned an unfavorable reply, again pointing to the Federal Council as the best agency through which to act. In reply Parkes insisted upon the inadequacy of the Council's power, suggested the desirability of achieving at once a union which was inevitable, and declared that neither he nor any other New South Wales leader was able to persuade that colony to join the Council. He outlined a constitution closely resembling, as he remarked, that of the Dominion of Canada, providing for a governor-general and a parliament consisting of a senate and a house of commons; he added, however, that other experience, notably that of the United States, would need to be consulted.[3] He proposed that both a constitution and an address to the Queen praying for its enactment be prepared by a convention.

Parkes did not confine his efforts to diplomatic correspondence. He covered much the same ground in a notable speech at Tenterfield on October 24, as he was returning from a conference with the Queensland cabinet.[4] He here

[1] Gillies' reply is printed in Parkes, *op. cit.*, p. 348 *et seq* ; the important communications in the subsequent correspondence appear in the same volume, pp 338-353 See also Victoria *Parliamentary Papers* (henceforth *Vic. P. P.*), 1890, vol ii, p. 1227 *et seq.* and Queensland *Parliamentary Papers* (henceforth *Qsld. P. P.*), 1890, vol. xl, pt. iii, p. 634 *et seq*

[2] Vic *P P.*, 1889, vol. iv, p. 965 (summarizing the report); *Sydney Morning Herald*, October 15.

[3] Parkes, *op. cit*, vol. ii, p. 341.

[4] *Sydney Morning Herald*, October 24, 25. Wise, *op. cit.*, p. 3 *et seq.*

advanced, as an additional reason for federating, the need for a uniform railway gauge. He pointed out incidentally that Australia was as populous as the United States had been in 1789.

Gillies still declined to abandon the Federal Council, an attitude in which the premiers of the other colonies adhering to that body supported him. Parkes was discouraged and on the verge of accepting failure when Lord Carrington, Governor of New South Wales, intervened; the Governor persuaded him to persevere, and wrote to the other governors.[1] The move was effective, and to Parkes' somewhat belligerent statement of his position in a communication dated November 11, Gillies returned a cordial reply in which he conceded that the Council would not always be adequate or meet the needs of federal Australia. Parkes for his part agreed to discuss the situation with the members of the Federal Council provided that they appeared as "representative public men" rather than in their official capacity, and the meeting thus agreed upon was held at Melbourne on February 6, 1890.

Obviously the outlook was not promising. Most of the colonies acceded to the Parkes request grudgingly, and New South Wales was far from united. Mr. Edmund Barton had kept the opposition there from formally committing itself against the project [2] but many felt that the program was merely a political trick. Some members of the Free Trade Party feared that free trade would be swamped in a federation, while many imperialists believed that union would prove the first step towards separation, and, for a time, many republicans opposed federation as a menace to local autonomy.[3]

[1] Wise, *op. cit*, p. 23 *et seq.*

[2] Wise, *op. cit.*, p. 33.

[3] Sydney *Bulletin*, January 4 and February 5, 1890.

Provincialists were still far from won over,[1] and still others disliked the prospect of the complications, inconveniences, and expense involved in federation [2]

2 THE MELBOURNE CONFERENCE OF 1890

The Melbourne Conference of 1890 made federation a concrete and practical problem, forcing the political leaders to define their views and to outline a program. The resulting statements and proposals naturally revealed differences, and the experience of other countries, already consulted to some extent for guidance in crystallizing views, and drawn upon for illustrations, was soon appealed to for precedents which might support opinions and strengthen arguments. In this preliminary conference principles rather than details were under consideration, and the knowledge of other federal governments shown by the delegates remained superficial—decidedly so in comparison with the learning displayed in the sessions of 1897-98. Bryce's *American Commonwealth* and the *Federalist* were almost the only works on the United States which were cited in the conference, and they were referred to neither often nor by many of the delegates. Elaborate preparations such as were made for the later meetings were lacking.

The official preliminaries took the form of correspondence,[3] without parliamentary action, so that the only public discussion of federation at this stage appeared in the press. For the most part suggestions were few and vague, the outstanding exception being the product of a meeting of the

[1] Represented in New South Wales by the now old but still outspoken Sir John Robertson.

[2] As Sir Julian Salomons of New South Wales

[3] Sir Samuel Griffith visited Victoria, South Australia and Western Australia in the weeks preceding the Conference. *The Age*, Melbourne, January 2, 1890.

Australian Natives Association at Melbourne, held on the call of Sir John Bray of South Australia for the purpose of formulating a federal program. Late in January, as this conference opened, an editorial in the Melbourne *Age* raised the question of state rights. Should the federal government have delegated or reserved powers? Parkes was reported to be desirous of a union on Canadian lines, in which the reserved powers would belong to the federal authority. On the other hand, Australian federal agitation had followed the American plan, and the Federal Council, it was pointed out, exercised delegated powers only. The Parkes program would virtually subordinate the small colonies to New South Wales and Victoria, a result already foreseen and opposed by South Australia, whose attitude *The Age* considered to be accurately summarized in Bray's presidential address to the Australian Natives Association; he proposed to limit the federal powers strictly. The editorial put the issue sharply —should the union be consolidation, which *The Age* believed Parkes desired, or a federation, such as Bray had described? [1]

The resolutions presented to the conference of the Natives Association called for a federal legislature to be composed of a governor-general and two houses, the members of one house to be elected by the state legislatures while those of the other were to be elected by the people, the representation of the colonies to be equal in at least one of the houses.[2] It was resolved that the federal government should deal with questions of general defence, the establishment of a federal court of appeal, relations with the islands of the Pacific, naturalization, uniform customs duties after a date to be agreed upon by the colonial legislatures, railroads, posts and telegraphs, the public debt, federal revenue, and the division

[1] *The Age*, Melbourne, January 22. This issue gives Bray's speech in full.

[2] *Idem.*

of any colony; provincial matters were to be left to the several colonies.[1]

This outline of a union, which was ignored by the Melbourne Conference, obviously suggests the Constitution of the United States, which had been briefly described by Bray in his address.[2] It received no official recognition, but it represented the views of many Australians, it received publicity, and it stood alone as an attempt to develop federal opinion.

In the Federation Conference itself most of the references to the United States and Canada were general and of no great significance. Similarities and differences in Australian and American conditions were often pointed out, as when Deakin reminded the Conference that Australia in 1890 had approximately the same area and number of inhabitants as had the Thirteen States in 1787.[3] Again, Dr. Cockburn of South Australia believed that the needs of the American colonies had been much more pressing than were those of Australia.[4] Deakin remarked that Australia need not wait to be forced into federation simply because federation had been forced upon Canada and the United States[5] Parkes was inclined to use the United States as a warning and a horrible example, declaring that prompt union would save Australia from the sort of treatment which led to the War

[1] *The Age*, January 25.

[2] Sir John cited Story, "Constitution of America"; he also cited Bourinot, "Constitutional Practice in Canada." Apparently he referred to Story, *Commentaries on the Constitution of the United States* and either *Parliamentary Procedure and Practice in the Dominion of Canada* or *Federal Government in Canada* by Bourinot.

[3] *Official Record of the Proceedings* and *Debates of the Australasian Federation Conference*, 1890 (henceforth cited as *Melb. 1890 Debs.*), p. 83.

[4] *Ibid.*, p. 130 *et seq.*

[5] *Ibid.*, p. 75 *et seq.*

of 1812, apparently suggesting that the United States had been bullied because of weakness.[1] He dwelt on the defects of the Articles of Confederation as illustrating the dangers of halfway federation,[2] and read a letter from W. E. H. Lecky in which the historian maintained that federation would have prevented the American Revolution [3]

The disposition to use the experience of other countries as arguments, which later became pronounced, appeared seldom, but Playford of South Australia used the refusal of the Philadelphia Convention to admit the press as an argument for adopting the same procedure at Melbourne,[4] and in discussing the means by which a constitution could be drafted and adopted Deakin recommended a national constitutional convention to be followed, after consideration by the Parliaments, by a popular referendum, much as had been done in the case of state constitutions in the United States.[5]

Details and specific constitutional provisions were not often considered, but occasionally some provision of the Canadian or United States Constitution received special commendation or criticism. Clark believed that the Australian federal legislature should be entrusted with more powers than the American Congress.[6] Deakin desired the establishment of a system of federal courts like that of the United States—both supreme and district courts, to deal

[1] *Ibid*, p. 43 Parkes had compared Australia's need for a better military system with the need of the United States in the time of Jefferson and Madison in a speech delivered in Sydney (Manly), January 6, 1890. He also noted on that occasion, as at Melbourne, the existence of internal free trade in the United States. *Sydney Morning Herald*, January 7, 1890.

[2] *Melb. 1890 Debs*, p. 217 *et seq.*

[3] *Ibid.*, p. 226 *et seq.*

[4] *Ibid.*, p. 10.

[5] *Ibid.*, p. 246 *et seq.*

[6] *Ibid.*, p. 107.

with cases affecting other nations, the states, and the citizens of different states.[1] Deakin also recommended that the central government be given control of territories similar to that possessed by the United States Congress; on the other hand he favored an easier amending process than that adopted in the United States.[2]

By far the most significant allusions to the American and Canadian federations bore upon state rights and the type of union to be formed Parkes in one of his letters written before the Conference met had assumed that Australian union "would necessarily follow close upon the type of the Dominion Government of Canada", specifically in providing for a Governor-General, a Privy Council, and a Parliament consisting of a Senate and a House of Commons[3] Most of the speakers at the Conference were agreed on the desirability of a real and powerful federation[4] Early in the sessions, however, Playford, in a speech almost belligerent in its frankness and vigor, gave the discussion a new turn, raising, for the first time in the deliberations, an issue which was to inspire much careful study and repeated debates on the character and merits of the Canadian and more especially of the American union. After alluding to Parkes' letter, Playford bluntly declared that South Australia would never accept such centralization of power as existed in Canada. He contended that the example of the Dominion should be exactly reversed and all possible powers be reserved to the

[1] *Melb 1890 Debs*, p. 89. See *infra*, p 185 *et seq*

[2] *Ibid.*, pp. 85 *et seq.*, 94.

[3] N. S. W. *J. L. C*, vol. xlvi, p. 72 (October 30, 1889), quoted in *Melb. 1890 Debs*, 147 November 4 Parkes sent the premiers a model draft of resolutions to be passed by the parliaments, providing for a constitutional convention

[4] *Melb. 1890 Debs*, p. 44 (Parkes); p 52 *et seq.* (Griffith); p. 91 (Deakin). p. 109 *et seq.* (Clark); p. 116 (Lee-Steere); p. 150 *et seq.* (McMillan); p. 185 (Macrossan).

colonial governments; to him the provincial governments of Canada seemed little more powerful than municipalities or parish vestries. He proposed to follow the United States Constitution in clearly limiting the authority of the federal legislature.[1]

Playford's challenge provoked much discussion, but since no constitutional provisions had to be framed, sharp clashes such as came later were avoided. Even Parkes was able to agree in principle that the individuality of the colonies must be preserved,[2] as was Deakin, later one of the ablest leaders of the large states group.[3] Clark of Tasmania, who showed little sympathy with some of Playford's remarks and who went so far as to suggest a union without South Australia and Western Australia, agreed entirely with South Australia in condemning unification. He referred to the union of the American colonies as " real federation ", terming the Canadian union " amalgamation ", and declared that the salvation of the United States of the future lay in the autonomy of the states.[4]

Cockburn, in a speech which gave evidence of more than usual knowledge and consideration of federal constitutions, joined Playford and Clark in condemning the Canadian terms of union, a union which he insisted was not truly federal. At the same time he classified the government of the United States as a compromise between federation and national union. He further pointed out that the American federal system was un-British and difficult to apply because of its lack of provision for responsibile government, and he

[1] *Melb. 1890 Debs.*, p. 71 *et seq.*

[2] *Ibid.*, p. 71.

[3] *Ibid*, p. 92.

[4] *Ibid.*, p. 105 *et seq.* Clark also asserted that the American Civil War was caused by slavery and not by state rights, a point much disputed later.

compared rigid written constitutions unfavorably with the elastic British product of experience and gradual growth. He was convinced that no precedents existed which Australia could follow [1] Deakin, also well-informed and thoughtful, was less pessimistic. He reminded the Conference that neither the United States nor the Canadian Constitution was the result of sudden inspiration, but that both were closely allied off-shoots of the British Constitution, and products of long experience. Of the two Deakin was inclined to make the Canadian the model for Australia, since the United States had adopted the alien doctrine of the separation of powers and had failed to provide for responsible government,[2] a conclusion also reached by Gillies, another Victorian, and President of the Conference.[3]

Other speakers took an intermediate stand. Macrossan of Queensland commended parts of both the Canadian and United States Constitutions. He called the American Senate " one of the grandest representative bodies in existence ", the equal if not the superior of the House of Lords. It seemed to him that a happy medium between the two types could be found [4] Captain Russell of New Zealand thought that Australia need not choose between the two but could draw upon both.[5] Bird of Tasmania expanded a sugges-

[1] *Melb. 1890 Debs.*, pp. 134-142

[2] *Ibid*, p. 250 *et seq.*

[3] *Ibid*, p. 241 Gillies remarked, however, that the Canadian Constitution need not be followed in detail. The Melbourne *Age* rather stressed Canadian precedent during the sessions. An editorial on February 6 remarked that probably the Canadian system would not be followed with "servile exactitude" but that it repaid study; the British North America Act was outlined in the editorial. The same issue carried a history of the earlier federation movement in Australia and a longer account of Canadian federation. References in *The Age* to the United States Constitution involved neither condemnation nor praise

[4] *Ibid.*, p. 198.

[5] *Ibid.*, p. 124.

tion made by his colleague, Clark, that Australian federation might well grow out of the Federal Council.[1]

Whatever the personal convictions or preferences of the individual delegates, they were committed by the resolutions finally adopted only to the "desirability of early union under the Crown", and to the establishment of a common legislature and executive "on principles just to the several colonies",[2] a program broad enough to include views quite divergent as to details. Nevertheless the later controversy between the large and small states, and even the nature of the arguments advanced in the state rights debates, were clearly shadowed forth in the preliminary discussion at Melbourne.

3 PREPARATIONS FOR THE SYDNEY CONVENTION OF 1891

The Melbourne Conference adopted resolutions calling for the election by the parliaments of seven delegates from each colony to a national Australasian convention which should "consider and report upon an adequate scheme for a Federal Constitution". In spite of some opposition and the temporary incapacity of Sir Henry Parkes because of an accident, the parliaments acted favorably and elected forty-five delegates,[3] including all the Australian premiers and many other outstanding political figures, to the convention which met at Sydney on March 2, 1891.

Save perhaps in Queensland, the debates in the colonial parliaments on this proposal to elect delegates to a national constitutional convention revealed little maturing of opinion and attitude. In New South Wales, where the opposition was strongest and parliamentary consideration most pro-

[1] *Melb. 1890 Debs*, pp 107, 173

[2] See Appendix I.

[3] Seven from each of the Australian colonies and three from New Zealand.

longed, the nature of the objections raised kept the discussion on rather a provincial level. Sir John Robertson wished to maintain the independence and liberties of New South Wales unimpaired, and ridiculed comparisons with conditions and results in the United States.[1] Mr. Want also opposed union in any form, and regarded federation as a "fashionable fad".[2] Dibbs, leader of the opposition to Parkes, one of a small number who looked forward to independence, favored amalgamation or unification.[3] Reid, who declared himself in favor of union, nevertheless took a stand which amounted to opposition to federation; in particular he was unwilling to sacrifice free trade, and he demanded consideration in detail of the constitution, when drafted, by the New South Wales Parliament.[4] Slattery desired merely a sort of Federal Council.[5] Passive assent to the general principles of federation was given, but much jealousy and mistrust of the other colonies was displayed, and an unwillingness to make sacrifices, or even to compromise, was revealed.[6] On the other hand their connection with a large state did not prevent O'Connor and Barton from expressing a strong preference for the United States rather than for the Canadian type of federation, and the latter even declared that he would not support union on Canadian lines.[7]

In a notable speech in the Queensland Assembly Sir Samuel Griffith declared against the Canadian Constitution

[1] Wise, *op. cit*, p. 98 *et seq.*

[2] *Ibid*, pp 103, 105 *et seq* ; Quick and Garran, *op. cit*, p. 122

[3] Wise, *op cit*, p 103 *et seq* ; Quick and Garran, *op cit*, p 122. The Sydney *Bulletin* was a vigorous advocate of separation

[4] Wise, *op cit.*, pp 103, 109-113, Quick and Garran, *op cit.*, p. 122.

[5] Quick and Garran, *op. cit*, p 122 His motion was defeated by a vote of 92 to 10.

[6] *Ibid.*, p. 122.

[7] Wise, *op. cit*, p. 115.

and for a senate modelled upon that of the United States, Responsible government, he pointed out, had not been written into British constitutions, without altering a law the American form of executive, with ministers chosen outside parliament and for a fixed term of years, could be adopted Responsible government, he maintained, was still new and on trial.[1]

Macrossan, commenting perhaps upon a suggestion [3] that a state rights party might appear in Australia as it had in the United States, expressed the opinion that the equal representation of states in the senate would cause no dissension In the same speech he commended the American provision reserving to the states all powers which were not delegated; he did not like the Canadian Constitution, but he admitted that it had not been a failure [3]

The debate in Queensland, as in the other colonies, revealed some knowledge of the United States and much interest in its government,[4] but few references were made to authorities on either the United States or Canada. In South Australia, where more than usual interest in the American government was shown, and where references to it were particularly numerous,[5] the *Federalist* was the only authority cited.[6]

[1] Queensland *Parliamentary Debates* (hereafter cited as *Qsld Debs*), vol. lxi (1890), p. 195.

[2] Made by Powers, the Postmaster General. *Ibid.*, p. 183

[3] *Ibid*, p. 246 *et seq.*

[4] McPherson and Groom greatly admired the United States Senate (*ibid.*, vol. lx, p. 578, vol. lxi, p. 183); McPherson, Rutledge and Philp commended the American judicial system (*ibid.*, vol. xl, p. 578; vo. xli, pp. 213, 223). Rutledge believed the coming convention would gain much from the experience of the United States (*ibid.*, vol. xli, p. 212).

[5] See, for example, South Australian *Debates* (hereafter cited as *S. A. Debs.*), 1890, p. 298 *et seq.*

[6] *Ibid.*, p. 233.

In Victoria Fitzgerald spoke against the United States Constitution, commending the Canadian plan of union and quoting a statement, which he incorrectly attributed to Washington, that in the United States "the union had to be extracted from the grinding necessities of a reluctant people" [1] Deakin in replying to an attack on the proposal of an Australian federation cited Bryce's praise not of the American Senate but of the House of Representatives.[2]

On the eve of the meeting of the 1891 Convention some of the newspapers, all of which had of course reported the Melbourne conference and the progress of the enabling bills, published accounts of the federation movement and described the provisions of the British North America Act On February 28, 1891, for example, the *Sydney Morning Herald* devoted over eleven columns to federation, giving a history of the movement, listing the powers of the Canadian federal government, and describing favorably the judicial system and amending process of the United States. It was remarked that there had been much discussion of the Canadian and American types of union, but that actually the new government would be modelled on the existing Australian constitutions. On March 2, the Sydney *Daily Telegraph* printed a three-page history of the Australian movement, but included no discussion of existing federations.

On February 16 the Melbourne *Age* outlined editorially a division of powers between the federal and local governments, counselling the following of the American plan of specifying the powers of the central government. On February 28 *The Age* sketched both the Australian and

[1] Victoria Parliamentary *Debates* (hereafter cited as *Vic. Debs.*), vol. xliii (1890), p. 484. The reference is apparently to John Quincy Adams' statement that the union "had been extorted from the grinding necessity of a reluctant nation."

[2] *Ibid.*, p. 339 *et seq.* Another citation of Bryce had been made immediately before Deakin's. *Ibid.*, p. 338.

Canadian federal movements and outlined, briefly, the Canadian constitution. Here again, however, there was nothing like the interest in precedent and the grasp of federal problems shown to some extent in the consideration of the 1891 Draft Bill, and to a much greater extent during and after the sessions of 1897-98.

A few of the federal leaders tried to stimulate interest and provide some background for the exacting work of constitution-making by gathering, digesting, and putting in readily available form such information and precedents as they considered helpful. In New South Wales Barton, O'Connor, Abbott, Wise, and others who were less conspicuous in the later developments, attempted to establish an *Australian Federalist,* modelled on the famous publications of Hamilton, Madison and Jay. Deakin of Victoria, Griffith of Queensland, and Chief Justice Way of South Australia, associated themselves with the project, but only two issues were brought out.[1] The attempt nevertheless inspired in New South Wales the publication of a critical analysis of the Swiss, American and Canadian constitutions, and an analysis in parallel columns of the American and Canadian Constitutions, much of the rest of the program was presently carried through by order of the Tasmanian Government.[2]

More successful was the effort of Mr. (later Sir) Richard Baker of South Australia, who prepared a *Manual* for the use of members of the 1891 Convention. Baker's work was necessarily hastily compiled, but it sketched the history of federal governments, summarized the thought of leading political writers on federal problems and existing federations, and printed in full the resolutions passed by the Quebec Conference, the British North America Act, the Constitution of

[1] On January 26 and March 2, 1891.

[2] Wise, *Making of the Australian Commonwealth,* pp. 100-102. For the Tasmanian contribution see *infra,* p. 57 *et seq.*

the United States, and the South Africa Union Act of 1877.[1] The *Manual* was frequently referred to in the 1891 Convention and its usefulness gratefully acknowledged at the close of the sessions;[2] it was also used in the later convention.

At the direction of the Tasmanian government Mr. Thomas C. Just compiled for the colony's delegates *The Leading Facts Connected with Federation*,[3] in which were collected articles and opinions of newspapers and of leading men on such phases of federation as defence, free trade, and finance, together with extracts from the *Federalist* and historical and descriptive accounts of federations in the United States and Canada. The governments of Mexico, the Leeward Islands, and Switzerland were also treated, briefly.[4] Considerable attention was paid to the distribution of powers

[1] The "Schedule of Books Cited" includes Adams and Cunningham, *Swiss Confederation*; Bagehot, *English Constitution*; Bluntschli, *Theory of the State*; Bourinot, *Federal Government in Canada*, and *Manual of the Constitution* [*al History*] *of Canada*, Bryce, *American Commonwealth*; de Tocqueville, *Democracy in America*, Dicey, *England's Case against Home Rule*, and [*Introduction to the Study of the*] *Law of the Constitution*; Gavan Duffy, *Road to Australian Federation* (London *Contemporary Review*, February, 1890); Goldwin Smith, *Canadian Constitution* (London *Contemporary Review*, July, 1887); *The Federalist Papers* [sic], *British North America Debates* (Canadian Hansard), Kent, *Commentaries on American Law*, Lowell, *English and American Federation* (*Fortnightly Review*, February, 1888), Montesquieu, [*De l'*]*Esprit des Lois*; Parkin, *Five Lectures on the Constitution of Canada*, Story, [*Commentaries*] *On the American Constitution*; Tarring, *Chapters on Laws Relating to the Colonies*; Todd, *Parliamentary Government in the Colonies*, Daniel Webster, *Speeches*.

[2] *Syd. 1891 Debs*, p 446

[3] Published as Paper No 112 in the Tasmanian *Journal and Papers of Parliament*, vol. xxiii (1891), 110 pages and appendices. The first twenty-one pages survey the federal movement through 1890

[4] The information concerning Mexico was derived from Poore, *Federal and State Constitutions, Colonial Charters . .*, and the *Statesman's Yearbook*, concerning Switzerland, from Hazell's *Annual* and Adams and Cunningham, *Swiss Confederation*.

in the Canadian Constitution. The most notable section on the United States was a summary of the leading facts and dates in the history of each of the states, taken from Poore.[1] Appendix (b) was a "synoptical table showing particulars of the constitutions having federal forms of government", terms and salaries of legislators, and statistics on area, population, and revenues.

Mr. Inglis Clark, who, as has been said, was a particularly great admirer of the political institutions of the United States, prepared a complete draft of a constitution.[2]

4. THE SYDNEY CONVENTION OF 1891

The National Australasian Convention met at Sydney on March 2, 1891, and sat for a little longer than six weeks. In order to provide some concrete basis for discussion in the Convention, Parkes drafted and submitted a series of resolutions which sketched a system of federal government.[1] These resolutions reflected the United States Constitution in every provision save that for the executive. The colonies were to retain all rights except those specifically delegated to the central government; intercolonial trade was to be free; control of customs was to be vested in the general govern-

[1] The other authorities on the United States cited in the bibliography include George Bancroft, Winsor, Hildreth, Henry Adams, and Schouler; Bryce, *American Commonwealth*; Curtis, *Constitutional History of the United States*; Macy, *Civil Government in the United States*; Fiske, *American Political Ideas*; Johnston, [*The*] *United States: Its History and Constitution*, and [*History of*] *American Politics*; Bryant and Gay, *United States*, and rather an indiscriminate jumble of other books.

[2] Wise, *op. cit.*, p. 75 *et seq*, Quick and Garran, *op. cit.*, p. 130. As chairman of the Judiciary Committee and a member of the Drafting Committee Mr. Clark had good opportunity to make his work count.

[3] See Appendix II. The resolutions had been drafted by Sir Henry and then discussed and somewhat revised at a meeting of the New South Wales delegates. Parkes, *op. cit.*, vol. ii, p. 358 *et seq.*; Wise, *op. cit.*, p. 118 *et seq.*

ment, as was responsibility for national defense. The federal parliament was to consist of a senate and house of representatives The senate was to be composed of an equal number of representatives from each of the colonies, elected one-third at a time. The members of the house of representatives were to be elected on a population basis, and the house was to have the sole power to originate and amend all money measures There was to be a federal supreme court, a high court of appeal whose decisions were to be final. The executive was to consist of a governor-general and of advisers who should sit in parliament and whose tenure should depend upon possession of the confidence of the house of representatives.

The speech with which Sir Henry presented these resolutions was followed by a general debate, in which nearly all the delegates expressed their views on federation and federal problems. It was soon apparent that the great issue was the senate and its powers: was the senate to be a mere "second chamber" or was it to be a coördinate branch of the legislature, a states house through which the states should be represented even in the enactment of financial measures and in the control of the executive? Or, as the delegates soon put it, was the senate to be modelled on that of Canada or on that of the United States? The problem was not easy, and occupied much time not only in the introductory general debate but in the committee stage that followed, during which the resolutions were considered in detail.[1] Although threatened with failure,[2] the committee weathered the storm.

There was more agreement on other matters It seemed fairly evident that the delegates desired a judiciary modelled

[1] See *infra*, chapter III.

[2] Particularly by Munro, Premier of Victoria, *Syd. 1891 Debs.*, p. 189 He was supported by Colonel Smith. *Ibid.*, p 193 *et seq.*

on that of the United States,[1] that they desired the identity and the powers of the existing colonies to be preserved as much as was consistent with federal principles, following, in this, American rather than Canadian precedent,[2] and that they desired the familiar forms of responsibile government to be retained. It was agreed also that trade among the states should be free. In spite of the conflicting views in regard to the senate and the difficulty of financial problems, the practicability as well as the desirability of federation was generally accepted. No serious differences arose as to the powers of the federal legislature; it was agreed that customs and defence should be under the federal government; the powers delegated to the American Congress corresponded roughly to the powers which it was proposed to give the Australian federal legislature, though there was already a tendency for speakers to suggest additional powers.

Parkes' resolutions were finally adopted by the Convention after consideration in committee of the whole, and a Committee on Constitutional Machinery was appointed to prepare a draft constitution. Committees on finance and the judiciary were also appointed, with instructions to report to the Committee on Constitutional Machinery, and a drafting committee, composed of Griffith, the chairman of this main committee, Kingston, Barton and Clark attended to the phrasing, style, and form of the report.

The report as presented—and virtually as adopted, for the changes made were slight—provided for a federal government of large but specified powers, for the retention of large powers by the states, for a parliament modelled on the American Congress except that the senate was to have no executive powers and was to be somewhat limited in financial legislation, for an executive which would presumably but

[1] *Infra*, chapter V.

[2] *Infra*, chapter VI.

not necessarily be responsible to parliament, and for a judiciary very similar to that of the United States. As will be seen, the report was accepted with no major change and with dangerous disagreement only in the question of the power of the senate.

5. THE FAILURE OF THE 1891 DRAFT BILL

The Sydney newspapers were naturally greatly interested in the progress of the Convention *The Bulletin* consistently opposed Parkes and all his views, and continued vigorously its demand for independence and a federal republic.[1] After the adjournment, *The Bulletin* condemned as "constitutional treason" to the future the failure to provide for an elective governor-general, and expressed disgust at the treatment accorded Sir George Grey and Dr. Cockburn, the extreme democrats of the Convention. The electors were advised to insist upon a popular referendum and a second convention to consider such amendments as might be suggested by the colonies [2]

The *Daily Telegraph* had welcomed the federal Convention with enthusiasm,[3] but the failure of the large colony delegates to play a dominant rôle, and the adoption of the compromise by which real power in finance was allowed to the senate, chilled the paper's ardor very appreciably.[4] In a distinctly critical treatment of the completed Constitution, the *Daily Telegraph* remarked:

The Bill is in many of its most important provisions based upon the original constitution of the United States—in fact, many

[1] See, for example, the issues of February 21, March 14, and March 28, 1891. *The Bulletin's* hostility to Sir Henry was quite unrestrained and appeared not only in editorials and cartoons but in the news.

[2] Editorials of April 11 and 18, 1891.

[3] Issue of March 2.

[4] The attitude of the large colonies was presented at length on March 26.

of the phrases and a few of the clauses are reproduced almost literally. But the framers of the American Constitution did not pretend to create an "American Commonwealth"; they undertook only to bring about a union of States under a Republican head. If the framers of our Federal Constitution had followed the American Convention in all the essentials of their scheme there would be some consistency at least in their design. But here we have on the contrary a reproduction of the compromise arrived at in a convention a hundred years ago, when democracy was untried and "responsible Government" was unknown, and the omission of the democratic principle embodied in the American Constitution —the election of the ruler by the people.

In America, the editorial continued, the President was set over Congress and given the power of veto, and the executive was created and removable by the people alone; in Australia the executive was to be responsible to two houses of Parliament, one of which was to be chosen in part by provincial second chambers based partly on nomination and partly on property qualifications. And then the representatives of one-third of the population were to be allowed to rule the representatives of the other two-thirds![1]

The *Daily Telegraph* also raised the question of state rights, complaining that the large powers of the federal Parliament reduced the provincial legislatures to a position much lower than had been contemplated. Federal taxation, social legislation, and other matters of great national concern would inevitably affect the states, and the fear was expressed that frequently a majority of the smaller states would combine in the senate to veto measures remitted to them by the representatives of a majority of the people in the house of representatives; that, it was said, was the common experience of America, where a similar form of state repre-

[1] April 1. See also editorials of April 4 and 9.

sentation existed, although the *Daily Telegraph* added that in America the evil was mitigated by the American type of executive.[1] The *Daily Telegraph* advised the Government to add amendments to the Bill before submitting it for ratification,[2] and finally declared that although it was for federation it was against the Bill; New South Wales ought not to be rushed into federation.[3] After the inconclusive elections of June the paper declared that the people had adopted the same view.[4]

The New South Wales Parliament did not meet until seven weeks after the adjournment of the Convention, although the views of the leaders had become well defined during the interval. A week after the close of the Convention Parkes spoke in Sydney in support of the Bill, but his enthusiasm was somewhat moderated by the great power which had been granted to the senate; he seems to have been more guarded than at the opening of the Sydney Convention. He took occasion to speak against republicanism and to praise the Queen, and criticised some provisions of the American Constitution.[5]

Reid addressed another meeting in Sydney on the same evening, speaking against federation and the Bill and supporting, in general, the attitude of Dibbs. He charged the

[1] April 9 No authority was cited for the statement that the small states often banded together in the United States The editorial went on to complain again of the certainty of minority rule and to charge great unfairness to New South Wales.

[2] April 20.

[3] May 1

[4] June 23 and 29. Nevertheless the *Daily Telegraph* gave a fair hearing to the supporters of the Bill, printing full summaries of speeches by Deakin and Barton; furthermore the views of Reid and Dibbs were condemned. Issues of April 24, 25, May 5 and June 18 and 19.

[5] *Sydney Morning Herald*, April 17, and the *Daily Telegraph* of the same date.

state rights party in the Convention with having found the United States Senate so admirable that they had desired to adopt the entire American Constitution, the imperfections of which he illustrated by descriptions of gerrymandering, senatorial patronage, and the disposal of the treasury surplus through pensions rather than through distribution among the states [1]

Barton replied the following week, defending the whole Bill as it stood, and praising the American Senate He denied that the Senate had caused the Civil War, for which he considered slavery responsible, and observed that the Senate was as popular since the war as it had been before He also denied that the Senate had ever caused deadlocks, and cited the favorable comments of Bryce and de Tocqueville on that body [2]

The Governor's speech at the opening of Parliament announced that the Constitution Bill would be submitted to Parliament immediately, and Parkes promptly gave notice of a motion which expressed approval of the Constitution, subject to any amendments which might be adopted and referred to another convention, and which should finally be submitted to the people for approval.[3]

Reid, who immediately proposed an amendment to the address in reply, objected to the financial power allowed the senate, to the omission of specific provision for responsible government, and to the control which the federal government was to have over railways, rivers, and debts. In an extended

[1] *Idem.* Reid cited John Fiske Dibbs spoke on May 4 (*Sydney Morning Herald*, May 5).

[2] *Sydney Morning Herald* and *Daily Telegraph*, April 25 Barton spoke again on May 18 (reported in the newspapers of the following day)

[3] New South Wales *Parliamentary Debates* (henceforth *N. S. W. Debs*), vol. 51, May 20; Parkes, *Fifty Years*, vol. ii, p 371 *et seq*; Quick and Garran, *op. cit.*, p. 144 *et seq.*

criticism of the Constitution he charged the Convention with having exceeded its powers, condemned Griffith's remark that the Bill must be accepted without amendment or else be rejected, and complained of the minor rôle assigned by the Convention to the colonial parliaments. He quoted Sir John Downer's attack on the final draft, made from the small colonies' point of view. In attacking the provision for equal state representation in the senate, Reid contrasted New South Wales' electorate with that of Western Australia, and New York's population with that of Nevada. He pointed to the corruption resulting from the election of senators by legislatures and quoted Bryce's comments on senatorial patronage, on extravagance, and on collisions between the two houses in the United States; he was particularly disturbed at the prospect of senatorial control of finance and at the inevitable adoption of protection. In spite of his critical attitude, Reid declared that he favored federation, but he believed that the movement was being pushed too rapidly and asserted that the American Fathers themselves would not approve of the Draft Bill—Hamilton had not even liked the American Constitution, but had accepted it as the lesser evil.[1]

At the close of the long debate which followed, and which included an extended reply by Parkes, the Reid amendment was defeated.[2] Instead, however, of proceeding with the Bill, Parkes unexpectedly deferred it, and political developments which made federation a secondary consideration prevented him from bringing it up for consideration during his

[1] *N. S. W. Debs*, vol 51, pp. 44-63 The speech is summarized in Wise, *op. cit*, p. 139 *et seq*, and in Quick and Garran, *op cit.*, p. 145 Sir Henry Parkes comments upon it, *op. cit.*, vol. ii, p. 373 *et seq.* Reid, in *My Reminiscences*, writes of the 1891 Bill (p 76 *et seq*) and gives an account of his opposition to it (p. 82 *et seq*).

[2] *N S. W. Debs.*, vol. 52, p. 185. The vote was 67 to 35; the address in reply was adopted 57 to 42.

remaining five months in power. The Bill played some part in New South Wales politics for three years more but never became an issue of first importance.

The *Sydney Morning Herald* of June 3 reported that Dibbs favored a confederacy in which New South Wales should preserve her full rights On June 9, *The Age,* of Melbourne, printed a letter written by Dibbs in which he based his opposition to the Draft Bill on the lack of a "one man one vote" provision, on the surrender of all revenue to the federal government, on the refusal to name Sydney as the capital, on the failure to allow the people to alter the Bill, and especially on proceeding before the people had expressed a desire for change. Dibbs was defeated in the general election of 1891 and had to stand a second time.

Following the June elections in 1891 the Labour Party held the balance of power. Though not hostile to federation, the Labourites were far from enthusiastic about the Draft Bill, and they naturally put their social program first. Parkes, somewhat against his will, continued in office until October.[1]

The leadership of the Free Trade Party—for Parkes insited upon retiring from it—passed unexpectedly to Reid.[2] At the same time the leadership of the federal movement passed to Barton,[3] who, again rather unexpectedly, took office in Dibbs' Government, with the understanding, however, that he was free to advance the movement for federation as much as he might be able.[4]

Parkes made an attempt to bring the subject of federa-

[1] See Wise, *op. cit.*, p. 152 *et seq.*; Parkes, *op. cit*, vol. ii, p. 377, and Quick and Garran, *op. cit.*, pp. 144, 145 *et seq.*, stressing the Labour objections to the Bill.

[2] Wise, *op. cit.*, p. 170 *et seq.*; Reid, *op. cit.*, p. 90.

[3] Wise, *op. cit.*, p. 165 *et seq.*

[4] Quick and Garran, *op. cit.*, p. 148.

tion before the New South Wales Legislative Assembly in March, 1892, but he was promptly blocked. He was now advising the election by the people of delegates to a new convention to frame a new bill, which should be referred to the people for acceptance or rejection. Barton opposed the suggestion at the time, though it was to be adopted in the end.

In November, 1892, Reid definitely announced himself a federalist, and at the same time Barton introduced resolutions in the Legislative Assembly [1] approving the Constitution Bill and providing for its consideration in committee of the whole. The resolutions were adopted in May, 1893, but Barton's retirement from the ministry prevented the consideration agreed upon.[2]

In Melbourne *The Age,* which had accepted, though with little enthusiasm, the Draft Bill as it had been adopted by the Convention,[3] followed with keen interest the critical campaign of June, 1891, in New South Wales,[4] noted the conferences held in Victoria on the manner of securing ratification,[5] and reported fully the consideration of the Bill in the Victorian Parliament, taking an increasingly definite and favorable attitude.[6]

[1] Sponsored by O'Connor in the Legislative Council.

[2] *N. S. W. Debs*, 1893, p 401 *et seq* ; Wise, *op. cit.*, p. 178 *et seq.*; Quick and Garran, *op. cit.*, p. 149 *et seq.*

[3] Issues of March 30 and April 7.

[4] Issues of June 9, 10, 18 and 19.

[5] Issues of June 8, 19, and 20. Parkes was in Melbourne on June 20 to confer on this question (*The Age*, June 21). Sir Henry had spoken in favor of federation at Hobart on April 27, and had conferred with Playford, the new Premier of South Australia, and Munro, at Melbourne on April 20. *The Age* reported that Parkes favored direct reference of the Bill to the people while Munro preferred consideration by the parliaments to be followed by a national convention. (*The Age*, April 28 and 30 and May 1.) Gillies, leader of the Victorian opposition, was supporting the Bill heartily (*The Age*, May 4).

[6] This was shown particularly in the sharp criticism of the proposals of Sir Bryan O'Loghlen, the leader of the opposition to the Bill in the Assembly. See the issues of June 25, July 1, 15 and 17.

In the Victorian Parliament, which began the consideration of the Draft Bill on June 30 on a resolution of approval introduced by Munro, some dissatisfaction was expressed with the provisions for the senate.[1] There was some unfavorable comment on the resemblance of the Draft Bill to the American Constitution. Richardson disliked the proposed senate and condemned the American Senate as a "sheer bargain"; Patterson believed that if the United States were to make a new Constitution the Canadian arrangement for delegated powers would be adopted.[2] Deakin found it necessary to deny that the Draft Bill was un-Australian and insisted that the proposed senate and amending process were original.[3] Zeal thought that the United States government was entirely too powerful.[4] There was some demand for an expanded Federal Council.[5]

Several amendments were adopted in both houses, and the colony was quite ready to go on with the Bill, but the reverse in New South Wales made action useless. In 1893 Sir James Patterson, the Premier, stated in the Assembly that the Government was always willing to cooperate in federation, but that its overtures had received little attention and that it was unwilling to take the lead from others who considered the leadership to be theirs.[6]

In Queensland the Brisbane *Courier* was highly pleased

[1] *Infra*, p. 100.

[2] *Vic. Debs.*, vol. 66, pp. 122, 295.

[3] *The Age*, July 17.

[4] *Idem.*

[5] *Idem.* (Melville and Zeal); see also Sir James Service, reported in *The Age*, July 8.

[6] *Vic. Debs.*, vol. 73, p 2921 *et seq.* In the same year Sir James urged New South Wales and South Australia to join the Federal Council pending the accomplishment of federation. Tas. *Journals and Papers of Parliament* (hereafter cited as *Tas. P. P.*), vol. xxviii (1893), no. 51.

with the Draft Bill and with the solution of the problems both of state rights and of the division of powers between the states and the federal government. An editorial on April 4 remarked that the state rights group had forgotten responsible government. At the some time it declared that the grant of financial power to the senate was the weakest point in the American Constitution: "The Senate wrangles with the House of Representatives over taxes, and still more keenly over appropriations. Almost every session ends with a dispute, a conference, a compromise"—a statement derived from Bryce. Another editorial, on April 8, pointed out that the powers granted to the federal Parliament were in the main those granted to the American Congress, with the addition of marriage and divorce; another editorial, two days later, commended the Bill highly, while expressing fear of the results of parliamentary jealousy. The *Courier* followed carefully the quarrel in New South Wales between Parkes and the opponents of the Bill, siding with Parkes.[1] Action in the other colonies was also noted, but interest declined after the June elections in New South Wales.[2] The Bill was never acted upon by the Queensland Parliament; Griffith moved that it be not considered, since federation without New South Wales would be futile.[3]

The South Australian Parliament undertook consideration of the Bill promptly and with enthusiasm, but by the end of 1892, in spite of Baker's efforts, action upon it was discontinued.[4]

[1] See the issues of April 21, May 26, 30, and June 19.

[2] See the issues of September 2 and 5 for accounts of Victoria, South Australia, and Tasmania

[3] Nelson of the Opposition agreed. Copies of the Bill were nevertheless circulated among the voters. *Qsld. Debs.*, vol. 65 (1891), pp. 2087 *et seq.*, 2102.

[4] *S. A. Debs*, 1891, pp. 91 *et seq.*, 215 *et seq.*, 1471 *et seq.*, for the As-

Tasmania proposed not only to consider the Draft Bill in Parliament but to refer it to a provincial convention elected by the people. The Assembly considered the Bill and adopted some amendments, but because of the failure of the Bill in New South Wales the Council promptly discontinued consideration of the measure.[1]

New Zealand never dealt with the Bill,[2] nor did Western Australia.[3]

6. THE POPULAR MOVEMENT AND PREPARATIONS FOR A NEW CONVENTION

Sir Henry Parkes had proposed a "Federal League for Australasia" in 1891, but the project had been unsuccessful,[4] as had been the attempt to arouse popular interest through publications resembling the American *Federalist*.[5] The Australian Natives Association, however, continued its federal activity,[6] and in 1892 a non-partisan Federal League was formed at Corowa, New South Wales. This new organization proved popular; the idea spread, with the result that branches were quickly established elsewhere in New South

sembly; pp. 270 *et seq.*, 340 *et seq.*, 416 *et seq.* for the Council For 1892, pp. 13, 401 *et seq.*, 2286. Some amendments were adopted. Members of Parliament displayed a considerable knowledge of American government and of the writings of authorities upon it The action of the Parliament is summarized in Quick and Garran, *op. cit.*, p. 147.

[1] Quick and Garran, *op. cit.*, p. 147.

[2] *Ibid*, p. 147 *et seq.*

[3] Battye, *History of Western Australia*, p. 447, confirmed by the lack of any mention of the Bill in the Parliamentary *Debates* of the colony or in Quick and Garran.

[4] Wise, *op. cit.*, p 185; also Parkes, *op. cit.*, vol. ii, p. 380.

[5] *Supra*, p. 56.

[6] It will be recalled that a meeting of the Association at Melbourne in 1890, just as the 1890 Conference was to meet, had drafted a federal constitution *Supra*, p. 46, and Quick and Garran, *op. cit.*, p. 150 *et seq.*

Wales and in the other colonies, and federal conferences were presently instituted.[1]

Of particular importance was the Corowa Conference of 1893, at which Dr. Quick of Victoria proposed, much as Parkes had done, that a constitution bill be drafted by a popularly elected convention and then submitted to a popular referendum. Under this plan action on the completed bill would be compulsory, and the failure of a parliament to act could not kill the movement.[2] Dr. Quick proceeded to put his suggestion in the more concrete form of a bill which he hoped would be passed in identical terms in each of the colonial parliaments. This bill, which was presented at a meeting of the Bendigo Federal League on January 1, 1894, provided for the popular election of ten delegates from each colony and for the forwarding of the draft constitution to the Imperial Parliament for enactment, upon approval by majorities of the voters in two or more of the colonies.[3]

Barton, now president of the Federal League, feared that the Quick plan failed to provide adequately for the harmonizing of the conflicting interests of the colonies, and it was therefore proposed that each colony first elect a provincial convention to formulate the ideas of the colony as to the content of the constitution, and then elect delegates to a national convention which, harmonizing conflicting views as much as possible, should frame a final bill upon which the people should vote.[4]

Sir George Dibbs, Premier of New South Wales, meanwhile proposed the unification of his colony and Victoria,

[1] Quick and Garran, *op. cit.*, p. 152 *et seq.*; Wise, *op. cit.*, p. 185 *et seq.*

[2] Quick and Garran, *op. cit.*, p. 152 *et seq* ; Wise, *op. cit.*, p. 193 *et seq.* The proceedings are fully reported in the *Sydney Morning Herald* of August 1 and 2, 1893.

[3] Quick and Garran, *op. cit*, p. 153 *et seq.*; Wise, *op. cit.*, p. 194.

[4] Wise, *op. cit.*, p. 195 *et seq.*

pointing to the advantages in economy, efficiency, good feeling, and prestige. He mentioned the Canadian union as the model for determining the functions of the provincial governments. He frankly recognized that the smaller colonies, for the present at least, would not enter on such a basis [1]

In 1894 Dibbs was succeeded as Premier by Reid, who entered office pledged to advance federation. Spurred, perhaps, by an attempt by Parkes to resume the leadership of the movement, Reid made haste to redeem his promise. He proposed to the other premiers that federation be discussed at a conference of the premiers to be held at Hobart at the time of the Federal Council meeting in January; they agreed, and the conference was opened on January 29, 1895. Some advance in federal opinion is evidenced by an able editorial in the *Sydney Morning Herald* of January 25, which favored a popularly elected convention and ratification of the draft constitution by a referendum. Bryce's statement that in America the constitutions made by conventions are better than the laws made by legislatures was cited.[2] The *Sydney Morning Herald* also favored a bicameral legislature, both houses of which should be popularly elected, with provision for the settlement of disagreements by a joint session. The premiers (all of whom remained in office through the 1897-98 Convention) were Mr. Reid, Mr. (presently Sir George) Turner, of Victoria, Mr. Kingston, of South Australia, Sir Edward Braddon, of Tasmania, Mr. (presently Sir Hugh) Nelson, of Queensland, and Sir John Forrest, of Western Australia.[3] It was promptly resolved,

[1] Letter of Dibbs to Sir James Patterson, the Victorian Premier, June 12, 1894, printed in part in Quick and Garran, *op. cit.*, p. 155 *et seq.*, and in Wise, *op. cit.*, p. 197.

[2] *American Commonwealth*, vol. i, p. 662 *et seq.* (1888 ed.).

[3] In Hobart for the meeting of the Federal Council were also Patterson,

unanimously, "that this conference regards federation as the great and pressing question of Australian politics". It was agreed that the 1891 Draft Bill was valuable as a basis for federation, but that it needed modification, and the fact that the colonial parliaments must be allowed a hand in making a constitution, even though they could not be expected to agree upon details, was readily accepted. Quick's plan for a convention to be followed by a referendum ignored the parliaments; the Barton-Federal League plan, providing for provincial conventions followed first by a national convention and then by a referendum, secured deliberation but again ignored the parliaments. The prestige of a popularly elected convention was recognized and desired by all the premiers except Forrest. The referendum, however, would be a novelty in Australia and there was less unanimity about it; Forrest and Nelson disliked it particularly.[1]

The Federal Council displayed considerable jealousy of the Conference. On January 31 the premiers nevertheless agreed to a program which included the election by the voters in each colony of ten delegates to a national constitutional convention, the reference of the draft constitution to the people of each colony, and the forwarding of addresses to the Queen if three or more colonies accepted the draft. An identical bill to put this program into effect was to be introduced into all the parliaments [2]

Cuthbert, and Deakin of Victoria, Clark, Adye Douglas, and Dobson of Tasmania, Byrnes of Queensland, and Lee-Steere and Hackett of Western Australia. New South Wales and South Australia did not belong to the Council. Wise of New South Wales was also present, however. Sir John Forrest finally decided to take part in the Premiers' Conference, although there had been some doubt about his doing so. Braddon was elected Chairman of the Conference. *Sydney Morning Herald*, January 28 and 29.

[1] *Sydney Morning Herald*, January 30

[2] *Sydney Morning Herald*, February 1.

A bill embodying the procedure agreed upon was drafted by Turner and Kingston, and formally accepted by all the premiers except Forrest, who did not attend the session which took this action. It made provision for the adjournment of the convention to secure the benefit of parliamentary and editorial criticism. It was understood that this bill would be introduced in all the parliaments save, perhaps, that of Western Australia.

The *Sydney Morning Herald,* which was still not quite sure of Reid's sincerity as a federalist, feared that perhaps after all no action would be taken, and the Conference might result merely in a postponement of union; it condemned the break with the past involved in the discarding of the 1891 Bill, and pointed out that if a colony should reject the constitution in the referendum there was no provision for any further action.[1]

The reaching of an agreement by the premiers was an advance of no small importance, but the colonial parliaments had still to be persuaded to accept the program adopted by the Conference. They soon demonstrated that not all Australians were yet thinking in federal terms. Reid introduced the enabling act in the New South Wales Parliament in October,[2] admitting frankly as he did so that he had been a strong opponent of the 1891 Bill, but asserting that union was Australia's destiny and recognizing that the Bill must form a large part of the federal constitution. Federation, however, must be popularly based.[3]

[1] Editorial, February 11. There is an account of the Conference in Quick and Garran, *op. cit*, p. 158 *et seq.* Wise, who was in Hobart at the time, gives a brief summary of the work of the Conference *Op. cit.*, p. 205 *et seq.*

[2] Other political issues had engaged his attention in the intervening eight months. Parkes in the meantime, in an attempt to take the federal leadership from Reid, even proposed a coalition with the Protectionist Party (led by Dibbs). Parkes failed to be returned in February, 1896, and died two months later, at the age of eighty.

[3] *N. S. W. Debs.*, vol. 80, p. 1917 *et seq.*

Most of the objections raised to the new proposals, aside from attacks on Reid's record as a federationist, took the form of demands that the 1891 Bill be used as the basis of deliberations instead of making an entirely new start. There was, however, some criticism of conventions as constitution-making bodies. Reid cited Bryce's praise of American constitutional conventions, but drew the retort that in Canada a convention had stultified the provincial parliaments and that the United States, under a convention-made constitution, was the most conservative country in the world.[1] The Legislative Council included several members who were extreme opponents of federation, but, perhaps because they were sure that the plan of the premiers would come to nothing,[2] they allowed the enabling act to pass without great objection, and almost in the form which had been agreed upon at Hobart.[3]

The *Sydney Morning Herald,* which had followed with keen interest the action on the New South Wales enabling bill, and the prompt activity of the other colonies, was delighted, declaring editorially that the situation was more promising than at any time since 1891. The same editorial warned, however, that the voters must be educated, and advised the federal leagues to take up the task. The *Sydney Morning Herald* suggested that the American example be followed—there the "drift" had been guided by Hamilton,

[1] W M Hughes, *ibid*, vol 81, pp. 2428 and 2444. Hughes also proposed that the colonies be represented in the convention in proportion to their population, and was defeated by a vote of 45 to 26. For the objections of Lyne, Carruthers, Copeland and McMillan to the Reid program see *ibid.*, vol 80, pp. 1924 *et seq*, 1929 *et seq.*, 1936 *et seq.*, and 2243 *et seq.*

[2] Wise, *op. cit*, p. 218; Quick and Garran, *op. cit.*, p. 161

[3] They did, however, refuse to vote any payment to the delegates; the Assembly was forced to give way, but the following year provision for the payment of the delegates was made. There were some references to the United States, especially from Garran and Brown; the latter had been in the United States. *Sydney Morning Herald,* December 12.

Madison, and Jay in the *Federalist*. Public meetings, popular lectures, debates, and open discussions were recommended.[1]

Turner introduced the enabling bill into the Victorian Assembly as soon as its passage in New South Wales was assured.[2] He too stressed the necessity for a popular basis. Practically no opposition to the measure developed. In the course of the consideration of the bill, one member of the Assembly stated that the "Constitution of the United States was as near perfection as any written document of that kind could be", and hoped that the Australian Constitution would be framed in exactly the same way. His explanation of how the American Constitution had been framed and ratified was, however, highly inaccurate [3]

In South Australia the enabling bill was passed almost as a matter of form and virtually without discussion,[4] and in Tasmania also it was passed without delay.[5] In Queensland Nelson introduced an enabling bill in June, 1896 He was attacked for the opposition which he was understood to have expressed at Hobart to the popular aspects of the premiers' plan;[6] now, however, he supported the popular

[1] December 23, 1895. In America the *Federalist* appeared in the ratification rather than the constitution-making period.

[2] On December 12, 1895. *Vic. Debs*, vol 79, p. 4124 *et seq.*

[3] *Ibid.*, p. 4426 (Murray Smith). The bill did not pass until February because the Council insisted upon some minor amendments. For the action of the Victorian Parliament see also Quick and Garran, *op. cit.*, p. 161 *et seq.*

[4] Action on the bill is reported in *S. A Debs*, 1895, pp 817 *et seq*, 2789 *et seq*, 2854 (Assembly); 2878, 2882, 2884 (Council).

[5] January 10. Quick and Garran, *op. cit*, p. 161.

[6] Sir Charles Lilley, Chief Justice of the colony, in a letter published in the Brisbane *Courier* of June 30, quoted Hamilton, in the *Federalist* on the necessity of a popular basis; Nelson quoted the letter in the Assembly. *Qsld. Debs.*, vol. 75, p. 138.

election of the federal delegates and carried his measure through the Assembly. The Council took a less liberal view and insisted upon having a part in electing the delegates, and in the deadlock which ensued the bill was lost.[1] Attempts in the Assembly in 1897, both to revive this bill and to pass a substitute, failed, and Queensland did not participate in the Convention of 1897-98.[2]

In Western Australia Forrest waited until March, 1897, when he introduced a bill which provided for the election of delegates by the members of the houses of parliament, rather than by the people. He declared that federation meant greater power and influence, pointed to the United States Senate and the American union as models for Australia, and remarked that he had met no one in Canada who regretted federation.[3]

The burst of enthusiastic activity in December, 1895, which resulted in the passage of enabling bills in four colonies, was succeeded by almost a year of waiting for action in the other two Western Australia, as has just been noted, finally joined the majority, and the necessity of proceeding without Queensland presently became apparent, although the leaders of the other colonies accepted the fact with reluctance, and the anti-federalists were quick to make capital of Queensland's absence. The Queensland federalists protested against the decision to move without their colony.[4]

[1] October, 1896. Quick and Garran, *op. cit.*, p. 162, give an account of the difficulties in Queensland.

[2] For the 1897 efforts see *Qsld Debs*, vol 77.

[3] *W. A. Debs.*, vol. ix, p. 848 *et seq.* This was passed with little discussion in either house. *Ibid.*, vol. ix, pp. 778, 847 *et seq.*, 859, 894, 948 (Assembly); 998, 1079, 1186 (Council); Quick and Garran, *op. cit.*, p. 162 *et seq.*

[4] See the Brisbane *Courier*, especially of January 18, 25 and February 1, 1897.

Reid finally set the machinery provided by the enabling acts in operation; candidacies for the seats in the constitutional convention were announced, and the campaigns warmed up rapidly. There was no longer any doubt that federation was the paramount issue in Australian politics, and the education of public opinion advanced very appreciably both through political meetings and through the attention which the press gave to the subject in the news, in editorials, and in special articles. Stating on January 23, 1897, the Sydney *Daily Telegraph* published a series of articles on *Federal Finance*, and on February 3 it printed an article on the election of the senate and the powers of the federal legislative houses of Canada and the United States. The *Sydney Morning Herald* began in March to devote a column daily to the "Federal Movement", and ran editorials on phases of federation almost daily throughout the month. The Sydney *Bulletin* outlined a constitution along extreme liberal lines; it is interesting both as the most definite of the federal programs advanced at this time and as an expression of radical opinion. It held that any name not in use elsewhere would do for the federation. There ought to be two houses, elected on the same suffrage, and they should be elected and expire, or be dissolved, simultaneously. Ministers should be elected at the beginning of each session by both houses sitting together. The houses should be coördinate in power, and disputes should be settled in a joint session. Any measure should be referred to a referendum if one-third, or some such fraction, of the combined houses, or a majority of the provincial legislatures, so requested. *The Bulletin* was no more enthusiastic than usual about monarchy, declaring:

> The figurehead above the Legislature [will have] to be a Governor General appointed as at present, because there is no other method just now available. When the Federation is complete

the Parliament of Australia may insist on electing its Governor General or replacing him by a President, but until that Parliament is constituted there is no authority strong enough to do so. And as the Federal Parliament will be indefinitely postponed if it doesn't start till the imported British figurehead is first done away with, it will be necessary to put up with the usual Carrington or Brassey for the present.

The federal government should take over the debts, railways, posts and telegraphs, customs and excise, army and navy, mines, patent office, control of education, and the control of all intercolonial rivers. There should be a supreme court. The federal government should have unlimited power to tax, and the state legislatures should be given no power to borrow. The legislative powers of the states should be defined by the federal parliament when such definition became necessary. There should be no right of secession. There should be a uniform criminal code and uniform quarantine, marriage, divorce, banking and corporation regulation. Amendment should be by a majority of the Parliament endorsed by the people in a referendum.[1]

In New South Wales there were forty-nine candidates for the ten seats in the Convention.[2] The Labour Party put ten candidates in the field; they stood for a single chamber, for elective ministries, and the adoption of the initiative and referendum.[3] The conservative element, which was really opposed to federation, but which preferred to say that it would welcome federation if the terms were favorable, supported another solid block of candidates, frequently referred to as the " Prudent Federalists ". They favored a program which at best would have brought only a weak confederation;

[1] January 2, 1897.

[2] The colony was not divided into districts; each voter was to vote for ten candidates.

[3] Wise, *op. cit.*, p. 219; Quick and Garran, *op. cit.*, p 163.

each colony was to retain its own tariff, and the power of the federal government to tax was to be limited to levies on the states.[1] The other candidates were not on a party basis. The *Daily Telegraph,* however, strongly backed a group known as the " Federal Ten ", composed of Barton, the foremost federalist of the colony, who had consistently preached federation throughout New South Wales in the discouraging months following the failure of the 1891 Bill, together with Reid, Brunker and Carruthers of the Ministry, Lyne, the leader of the Opposition, McMillan, former treasurer and a member of the 1891 Convention, McGowen, the leader of the Labour Party, and R. E. O'Connor, Walker, and Wise. With the substitution of Sir Joseph Abbott, the Speaker of the Legislative Assembly, for McGowen, this ticket was elected. The candidacy of the Roman Catholic prelate, Cardinal Moran, long a devoted federalist, injected religious prejudice into the campaign but had the effect of greatly stimulating popular interest.

Barton, whose platform was virtually the 1891 Draft Bill, was returned at the head of the poll. Reid was second. He had now declared the 1891 Bill to be an invaluable basis for the coming work of making a federal constitution, but he still insisted that its financial provisions were inadmissible. He declared that he did not consider the guarantees of state rights to be dangerous, and he was willing to accept equal representation of the states in the senate, though he wished the size of the body to be decreased; he also desired the lower house to number only sixty. He favored a definite requirement of responsible government, and believed that there should be a federal court of appeal whose decisions should be final; he thought the public debts of the federating colonies should be consolidated.[2] Of the successful candi-

[1] Wise, *op. cit*, p. 219 *et seq.*

[2] See his election advertisement in the Sydney *Daily Telegraph,*

dates only Lyne, the Opposition leader, refused to accept equal state representation in the senate; two of the ablest of the candidates failed apparently because of their opposition to such equality. Three of the successful candidates favored the taking over by the federal government of the railways and the public debts, but Barton, Reid, and O'Connor were opposed. Reid insisted that there should be a deadlock provision, and favored a joint session as the best device; he also desired to limit the financial power of the federal government. Barton opposed him squarely on these points.[1]

In Victoria the campaign was vigorous but somewhat less heated. *The Age* remarked editorially that the question was no longer whether federation was desirable—that had been settled—but what type of federal delegate was desired. It insisted that the delegates be democrats,[2] and soon published a list of liberals whom it proposed to support Those named were Sir Graham Berry, a former premier, Deakin, Fraser, Higgins, Isaacs, Peacock (the Colonial Secretary), Quick, Trenwith (the Labour Leader), Turner, and Zeal. *The Age* supported this list strongly, referring to the other candidates as "Tories".[3] The Victorians were much interested in the financial clauses, and there was considerable demand for some means of breaking deadlocks[4] Higgins preferred responsible government to the American type.[5] Isaacs preferred the decentralized American government

January 26, 1897, and a speech at Sydney reported in the *Morning Herald* of February 19 Election advertisements of R. E. O'Connor and McMillan appeared on January 23 and 28.

[1] Wise, *op. cit*, p. 223 *et seq.*

[2] February 8.

[3] The issues of February 25 and thereafter. There were twenty-nine candidates in Victoria.

[4] See editorials in *The Age* on February 22 and 25, and speeches of Turner and Isaacs reported in the issues of February 20 and 24.

[5] *Ibid.*, February 10.

to the Canadian centralization. In the end the ten candidates supported by *The Age* were all elected.[1]

The sharp division of South Australia into political factions resulted in the naming of a conservative and a liberal ticket. The National League nominated a group which included Baker, Downer, Glynn, Howe, Solomon, and Symon. The list advanced by Kingston, the Premier, included himself, Cockburn, Holder, O'Loghlin, and Gordon. The Progressive League then named a compromise ticket which included Baker, Downer, Glynn, Gordon, Holder, Howe, Kingston, Solomon, and Symon, all of whom, together with Cockburn, were elected.[2]

South Australia was distinctly a " small state " colony; the issue was not whether the senate should be powerful but how far the delegates should go in insisting upon equal power for the upper house. The South Australian candidates included some notably able men, and their campaign revealed rather more study of federal problems than was apparent eslewhere. Symon's speech at Adelaide on February 8 quoted Chief Justice Marshall, cited Washington in describing the weakness of Congress under the Articles of Confederation, which was likened to the Australian Federal Council, and quoted the preamble to the American Constitution, stressing " We, the people ", to emphasize the need for a popular basis for federation. In praising the 1891 Bill Symon remarked: " It is modelled on the Constitution of the United States, which, after all, ranks above every other written constitution for the intrinsic excellence of its scheme "; he desired a constitution even freer than that of the United States, however. He favored full autonomy for the states and provisions for

[1] Turner at the head, followed in order by Quick, Deakin, Peacock, Isaacs, Trenwith, Berry, Fraser, Zeal and Higgins.

[2] Adelaide *Observer*, March 13. There were thirty-three candidates in all.

intercolonial free trade, the permanence of the union, the election of senators by the legislatures, as in the United States, and the amendment of money measures by the senate In spite of this last proposal he preferred the English form of responsible government to the American executive. He assured his audience that the difficulties to be faced were less than those confronting the Americans of 1787, and used an account written by Franklin to support this statement.[1]

The electoral notice, or advertisement, of Mr. Howe, another of the successful candidates, favored federation if it preserved the independence of the federating colonies, intercolonial free trade, federal control of railroads to prevent cut-throat tariffs, a bicameral parliament with equal state representation in the senate and popular election of senators, the same franchise for the electors of the lower house as for the provincial lower houses, consolidation of the public debt, the taking over of the Northern Territory by the federal government, and a White Australia.[2]

Several articles by Sir Richard Baker, which had been published in provincial papers, were collected and reprinted as a whole by the *Observer*.[3] They dealt variously with "Federation, Confederation, and Consolidation", emphasizing the need for a "states' house", a subject upon which Franklin was quoted; with the advantages of federation, placing stress on the maintenance of peace, on economy, and on centralized control of foreign policy; with the management of debts and credit, inter-colonial free trade, the treatment of colored races, economy and efficiency in the manage-

[1] Supplementary pamphlet in the Adelaide *Observer* of February 16.

[2] Adelaide *Observer*, February 20. The election addresses of Holder and Cockburn appeared in the *Observer* of February 27 The editorials of the paper were weak.

[3] Supplement to the issue of February 27. See Bibliography, *infra*, p. 276.

ment of posts and telegraphs, the cession of the Northern Territory to the federal government, and uniform control of quarantine, lighthouses, patents, etc. He also considered the disadvantages of federation, which he believed to be confined to the loss of prestige for the smaller states, the injury to provincial capitals, and the loss of provincial control of the tariff—the conclusion being that the disadvantages were few and unimportant. He noted the disadvantages of other forms of union, referring particularly to the Federal Council, the Articles of Confederation, and quoting from Hamilton in the *Federalist*, and discussed finance and disputed points, such as the manner of election of senators, the extent of the power of the senate, and the nature of the executive. Sir Richard desired, as always, a senate as powerful as the other house. He denied that Canada was a true federation, one of his favorite contentions.

Tasmania was strongly in favor of federating and, naturally, of maintaining state rights. The successful candidates there were Sir Philip Fysh, Treasurer and former Premier, and a member of the 1891 Convention, Sir Edward Braddon, Premier of the colony, and Messrs. Dobson, Lewis, Brown, Grant, Adye Douglas, Moore, M. J. Clarke, and Henry.

The Western Australian Parliament amended its enabling act at almost the last moment to allow Parliament to elect delegates before the Convention should open. Those chosen included Sir John Forrest, still Premier, Lee-Steere, and Hackett, three of the delegates to the 1891 Convention.

As in 1891, there were some attempts to prepare the members of the Convention for the task of constitution-making. The 1891 Draft Bill and the debates of the Sydney Convention had been freely circulated,[1] and Baker's *Manual*

[1] *N. S. W. P. P.*, 1891, vol. i; *Vic. P. P.*, 1891, vol. iv; *S. A. P. P.*, 1891, vol. iii, no. 78; *Qsld. P. P.*, 1891, vol. xli, pt iii, pp. 883 *et seq.* The 1891 Bill had also been published in 1891 with editorial notes by G. B. Barton.

and the Tasmanian blue book were still useful.[1] In addition Mr. R. R Garran published *The Coming Commonwealth: an Australian Handbook of Federal Government,* intended for the use of ordinary citizens.[2] The work contained an introductory essay on "the federal system," a chapter on early federations, and another on modern federations, specifically the United States, Canada, Switzerland, Germany, and "other federations", together with an historical sketch of the Australian federal movement and a chapter of over one hundred pages on such questions as the federal legislature and its powers, the executive and its powers, the judiciary, finance, the states, the capital, and the amending process.[3]

Sir George Turner had caused much information on federal topics to be compiled for the federal delegates, making readily available many of the views expressed in the Sydney Convention and in the parliaments during their consideration of the 1891 Bill, and also by candidates and the press during the federal campaigns of 1897. There was also consideration of many matters such as were treated in Garran's work. At the same time the 1891 Draft Bill, the federal Constitutions of Canada, the United States, Germany, and Switzerland were analyzed for the convenience of the Victorian delegates.[4] It was evident, too, that many members of the Convention had devoted some time to Bryce, to Madison's notes on the American Constitutional Convention of 1787, and to the *Federalist.*

[1] *Supra,* p 57

[2] Sydney and London, 1897, reviewed in the *Daily Telegraph* of January 7, 1897.

[3] Deakin praised the work highly in the Adelaide session. *Adel 1897 Debs*, p. 288. Garran served as secretary to the New South Wales delegation in the Convention.

[4] *The Age,* Melbourne, March 20, these papers were reprinted in *N. S. W. P. P.*, 1897, vol. ii, p. 169 *et seq*

7 THE CONVENTION OF 1897-98 AND THE 1898 CONSTITUTION BILL

The Convention opened at Adelaide on March 22, 1897,[1] elected Kingston, the South Australian Premier, President, and settled down to work by delegating Barton of New South Wales to draft and submit resolutions similar to those presented by Parkes in 1891. They thus decided to undertake the drafting of a new constitution rather than the revision of the 1891 Bill, though some of the members believed the latter course would have been easier and quicker At the same time Barton was made "floor leader" and given large control of matters of procedure; it was he to a great extent who directed the drafting of reports and the Convention's consideration of the new Draft Bill.[2] Barton reiterated his faith in the 1891 Bill and expressed the opinion that the new Bill would resemble the old very closely, but he did not believe that the adoption of the latter as a basis for the Convention's deliberations to be practicable.[3] His resolutions, as he pointed out, were those of Sir Henry Parkes with only slight modifications. They provided for the preservation of important powers of the colonies and of existing boundaries, for federal control of customs and excise and of defence, and for intercolonial free trade; they outlined a federal govern-

[1] The Adelaide *Observer* printed full accounts of happenings in the session and outside the actual meetings as well The issue of March 27 was especially full and carried an illustrated supplement; the issue of April 3 was also more than usually valuable. The leading papers of the other capitals reported the session fully. Wise, who was one of the New South Wales representatives, gives rather a brief account of the Convention's work; Reid's *My Reminiscences* gives little more. Quick and Garran are authoritative, as always, but their treatment is brief.

[2] *Official Report of the National Australasian Convention Debates, Adelaide, March 22–May 5, 1897* (hereafter cited as *Adel. 1897 Debs.*), pp. 10-16.

[3] *Ibid.*, p. 10 *et seq.*

ment consisting of a parliament of two houses, one a states house, the other chosen on a population basis and possessing sole authority to originate revenue measures, an executive, and a supreme court which should also be a high court of appeal for all the states.[1] In the speech with which he introduced these resolutions Barton expressed his personal conviction that the states should be equally represented in the "states assembly"; he also preferred that senators be popularly elected, although he had considered such details out of place in the resolutions. He also stressed his personal belief in the necessity for the supremacy of the lower house in finance, and for an appointive rather than an elective governor general; responsible government, following the 1891 precedent, he would not make absolutely compulsory.[2]

The procedure of the new Convention was very like that of 1891. A general debate on Barton's resolutions served to acquaint the members with one another and to clarify and define the views which were represented. The resolutions were adopted, without detailed consideration in committee of the whole, on March 31, and three committees were appointed, as in the 1891 Convention, to draft a constitution in accordance with the resolutions As in 1891, again, the committees on finance and the judiciary were to report to the Committee on Constitutional Machinery.[3] Barton, the chairman of the Committee on Constitutional Machinery,

[1] *Adel. 1897 Debs.*, p. 17 *et seq.* The resolutions are reprinted in Appendix V.

[2] *Ibid.*, p. 22 *et seq.* Baker promptly announced that eventually he would challenge restrictions on the financial power of the senate and any attempts to establish responsible government. *Ibid.*, p. 27 *et seq.* As in 1891, the resolutions were intended merely to provide a basis for discussion; details were omitted, and speakers were expected to expand the resolutions as they liked.

[3] *Ibid.*, p. 395 *et seq.*

O'Connor of New South Wales, and Downer of South Australia, were appointed to be a drafting committee, in charge of phraseology and style, and charged in general with the correct and effective expression of the will of the committees. As in 1891 the sessions of these committees were secret, and only the briefest of official summaries were given to the press by the chairmen.

Barton reported the draft constitution to the Convention on April 12. It was immediately taken up in committee of the whole. In accordance with the enabling acts, the Convention adjourned on April 23 to give the colonial parliaments an opportunity to consider the draft and to make suggestions. During the adjournment the premiers were in London for Queen Victoria's Jubilee The Convention resumed its work at Sydney in September, giving consideration to the recommendations of the parliaments and to problems which had not been entirely settled in the first session Colonial politics necessitated another adjournment, on September 24, to Melbourne, where the final session was held from January 20 to March 17, 1898.

As in the earlier Convention, state rights and the question of the senate's financial power presented issues which threatened federation with failure. In the end the 1891 solution was adhered to. Financial problems—the division among the states of the surplus derived from customs, and the control of rivers and railroads—proved more troublesome than had been the case six years earlier. The debates were long and frequently bitter. The demand for "deadlock provisions"—for some machinery, that is, to ensure the settlement of issues on which the two houses of Parliament might fail to agree—was much more vigorous than in the earlier Convention, and in the end such provisions were included.

The Convention of 1897-98 followed its predecessor closely in most respects. The members of the later body

were, however, much better informed about federal problems, and the debates frequently reached a higher level. Democracy had made decided gains, as was shown in the decision to have senators popularly elected, to reduce the qualifications for election to parliament, and to make the amending process simpler and easier. The list of powers to be exercised by the federal government was somewhat lengthened, reflecting particularly the increased importance attached to social and economic problems, and, occasionally, a desire to define closely the powers which were granted.[1]

As has already been suggested, both the press and the colonial parliaments had more to do with the making of the new than of the old draft. The newspapers reacted promptly to views expressed and decisions reached in the Convention, and frequently attempted to lead and to influence public opinion, from the time of the election of the Convention members on.

In Queensland the Brisbane *Courier* reported the settlement of the state rights controversy arrived at by the Adelaide session, but expressed no very decided opinion upon that or other issues; the paper had a high regard for the 1891 Bill, and appeared to be quite satisfied with the work accomplished at Adelaide.[2]

In South Australia the Adelaide *Observer* similarly reported the work of the Convention with some fullness, but made little effort to direct public opinion through its editorials; no vigorous stand was taken even on state rights [3]

The *Sydney Morning Herald* refrained at this stage from committing itself on the Bill, although reports of debates and the fullest available accounts of the work of the com-

[1] These points are considered more in detail later.

[2] Issues of March 25, April 1, and June 12, 1897.

[3] It was simply noted on April 3 that "the States House is apparently to be the predominant partner in the federation".

mittees were published. The news items sometimes reflected the attitude of the large colonies towards the financial power of the senate and towards deadlock provisions.[1]

At Melbourne *The Age* was not so reticent. It was thoroughly in sympathy with the program of the Turner Government, and vigorously supported the proposals of the Victorian delegates in the Convention, apparently quite undeterred by any fear that its frequent and powerful editorials might in the end set public opinion against federation. *The Age* became particularly exercised over the subject of state rights. During the general debate, an editorial expressed satisfaction that an arrangement had been accepted in which the small colonies secured a senate and the large colonies took away the financial powers of that body.[2] Within a week, however, the constant references to the American Senate aroused *The Age* to a strong criticism of that chamber, in which it was stated that the power to amend money bills was given to the American Senate quite unintentionally in an attempt to prevent " riders " to such bills; it was understood that the senate would have no power in finance, and the departure from that understanding had resulted in much corruption, for which the Senate had become notorious. It had constantly increased its power; the right to ratify treaties was granted to it exclusively because its debates were then secret He asserted, mistakenly, that as early as 1795 it had refused information to the House of Representatives in regard to the British (Jay) Treaty, even though appropriations were necessary for carrying out the terms of the treaty.[3] In America

[1] Especially on April 8 and 9 Apparently the lack of any expression of enthusiasm for the Bill was due to a desire to secure several modifications at the next session.

[2] March 31, 1897. Another editorial had appeared on March 25, commenting on Turner's opening speech.
in 1796.

[3] Actually President Washington, not the Senate, refused the papers, in 1796.

a few senators were able to thwart the people by forming a corrupt combine.[1]

Four days later the same ground was covered again in another editorial, in which it was sweepingly concluded that "the Senate in America is almost everything which an Upper Chamber ought not to be". *The Age* accused the smaller colonies of demanding an unconditional surrender,[2] and it expressed resentment towards the attitude of Tasmania and Western Australia and also severe criticism of Barton, Braddon and Forrest. When, in the end, the senate's financial powers were restricted the victory was far from graciously received.[3] The financial settlement finally agreed upon also met with little favor in *The Age,* which was gloomy about the prospects of federation in view of the defects of the bill.[4] As the Adelaide Session ended *The Age* resumed its attacks on state rights and the American Constitution, asserting that the "idea of having 'State Rights' in a Federal Constitution is simply a contradiction in terms"; America discovered the fact too late, and her example constituted a warning. The United States federated hastily, under pressure, and, to

[1] Editorial, April 5, a column and three-fourths in length. A paper read by Bourinot before the Royal Society of Canada apparently furnished the details used. The issue of April 5 also mentioned a crisis on the financial power of the senate and a warning delivered effectively to small colony delegates by Kingston. This was in the meeting of the Committee on Constitutional Machinery.

[2] April 9. Another uncomplimentary reference to the American Senate was made on April 19.

[3] Issues of April 10, 12, 13, 14 *The Age* expressed sympathy with Higgins' attack on equal state representation (April 10), and a news item of April 14 declared that apparently federation was an impossibility since the senate was allowed far greater financial power than in 1891. On April 15 it was admitted that one obstacle had been removed, but an editorial pointed pessimistically to the remaining problems of finance and deadlocks.

[4] April 8, 15, 26 and 29, 1897.

The Age, the wonder was that they had not committed even more mistakes; Australian conservatives, however, had tried to ignore all the American defects and the War of Secession, and to "slavishly copy what we find written, defects and all".[1]

At the same time *The Age* was able to report that Australia was agreed on four points: that local governments were still essential for many functions, and unification was impossible; that union for some purposes was a necessity; that secession must not be permitted, and that no Federal Council or Confederate States of America would do; and that an *Australian Nation* was wanted, without the disintegrating idea of state rights. Soon readers were even assured that although neither Reid nor Turner could recommend the Bill, federation was not hopeless; much of the 1897 Draft was good, and it was a great improvement on the 1891 Bill.

When the Convention resumed its work at Sydney in September, 1897, to consider the recommendations of the parliaments, and to continue the consideration of controversial problems for which no definitive solution had been found at Adelaide, the particularly troublesome subjects were the powers of the senate, "deadlock" provisions, the financial settlement, and railway and river control. These could not be settled in a brief session of three weeks The final session was held at Melbourne between January 20 and March 17, 1898, and the draft then adopted was sent, in accordance with the enabling acts passed by the parliaments of five of the colonies, to the people of the various colonies for their action.

This draft—the Constitution Bill of 1898—, which with some few changes of detail was finally ratified by the six colonies and enacted by the Imperial Parliament, provided

[1] Editorials, April 19 and 22.

for an indissoluble federal union with a framework of government in which many of the federal features of the American Constitution were successfully reconciled with principles of British responsible government which were more familiar to Australians.

The executive power of the Commonwealth was to be vested in a Governor General, representing the Queen, advised by a Federal Executive Council which should include not more than seven Ministers of State. These Ministers were to be charged with the administration of the executive departments, and were required to be appointed from, or to be immediately elected to, one of the houses of Parliament.

The legislative power of the federal government was to be exercised by a Parliament consisting of the Queen (represented by the Governor General), a Senate, and a House of Representatives. The Senate was to be composed of an equal number of senators from each state, elected directly by the people for a term of six years with half retiring every three years, but subject, as will appear, to the possibility of dissolution before the expiration of their term. The Senate was given no such special powers as the ratification of treaties, the approval of appointments, or the trial of impeachments, all of which are possessed by the American Senate. In finance the Senate's power was limited to approval or rejection of measures sent to it by the House of Representatives, except that it could suggest changes which the House of Representatives was not bound to adopt. Otherwise the power of the two houses was declared to be equal. The House of Representatives was to be composed of members elected by the people, from districts established on a population basis, for a term of three years, subject, however, to dissolution before the expiration of the full term. There were to be as nearly as possible twice as many representatives as senators. The legislative powers of

Parliament were confined to subjects specified in the Constitution, or incidental to the execution of powers vested in some branch of the Commonwealth or in some federal official; the list of delegated powers was long, however, and included many matters of outstanding importance. "Deadlock" provisions authorized the Governor General to dissolve both houses of Parliament if the Senate persisted in refusing to agree to a proposed law passed by the House of Representatives, if the dissolution failed to bring about agreement the Governor General could then refer the disputed measure to a joint session of the two houses

The federal judicial authority was vested in a federal High Court and other courts which Parliament might create or invest with federal jurisdiction. In general, the jurisdiction of the High Court and of the federal judicature as a whole closely resembled that of corresponding courts in the United States. Appeals to the Privy Council were so limited as to be virtually prohibited.[1]

The financial powers of the Commonwealth and the states were closely defined. Trade among the states was to be free. Parliament and an Inter-State Commission established by the Constitution were given large powers in the regulation of commerce among the states, and Parliament was given extensive powers for the regulation of corporations. Control of customs duties passed to the Commonwealth, and provision was made for the distribution among the states of surplus revenue. Parliament was authorized to take over, in whole or in part, the public debt of the states.

The states were to preserve their constitutions, and their parliaments were to retain all powers except those exclusively vested in the federal Parliament or withdrawn from the states by the Constitution; the states retained large powers. The federal Parliament was empowered to admit new states,

[1] *Infra*, p. 97.

and to impose such terms of admission—even affecting the basis of their representation in either house of Parliament—, as it might see fit. Provision was made in the Constitution for the establishment of a federal capital, and the final Constitution Act, though not the Bill as it left the Convention, stipulated that the capital should be in New South Wales but not within one hundred miles of Sydney.

Provision was made for the amending of the Constitution without resort to the Imperial Parliament. The American amending process was considered too difficult. After much deliberation it was decided to require the approval of an absolute majority [1] of both houses of Parliament and the approval in a majority of the states of a majority of the electors voting, with the added provision that a majority of all the electors voting, regardless of state lines, must also approve the proposed change.

8. THE STRUGGLE FOR RATIFICATION AND THE ENACTMENT OF THE BILL [2]

Following the final adjournment of the 1897-98 Convention, on March 17, 1898, the federal leaders in New South Wales, Victoria, South Australia, and Tasmania undertook campaigns to arouse the people and to secure acceptance of the Bill in the poll which was to be held on June 3 and 4. Queensland still took no action; Western Australia hesitated and awaited the outcome in the eastern colonies. Victoria, South Australia, and Tasmania ratified by overwhelming majorities.[3] In New South Wales

[1] A majority, that is, of the total membership rather than a "simple majority" of those present and voting.

[2] The details of the campaigns for ratification are given in chapter viii, "The Bill Before the People," in which the reaction of the colonies to the 1898 Constitution Bill is treated.

[3] In Victoria, 100,520 to 22,099; in South Australia, 35,800 to 17,320 and in Tasmania, 11,706 to 2,716.

Barton, O'Connor, and Wise made every effort to secure the success of the Bill, but Reid, though he said that he considered himself bound to vote for it himself, criticized it with increasing sharpness Lyne, the leader of the Protectionist Party, opposed it definitely, and the influential *Daily Telegraph* attacked it in unmeasured terms. In the poll a majority approved the Bill, but it failed to secure the 80,000 affirmative votes required by law [1] The New South Wales Parliament was dissolved and a new election was held on the single issue of federation, with Barton favoring the adoption of the Bill almost without change, while Reid demanded several modifications of its provisions [2] The result was a victory for Reid, though his losses were heavy and his margin slight; of the desire of the colony for federation there seemed no doubt. With his leadership confirmed, Reid was in a position to negotiate with the other Premiers, he secured a conference which met at Melbourne in January, 1899, and which was attended by Forrest of Western Australia and Dickson of Queensland. Several of Reid's proposed amendments were accepted [3] and a second referendum was planned.

In spite of the unyielding opposition of the *Daily Telegraph* and of a conservative minority in New South Wales, the amended Bill was adopted there in June, 1899, by the conclusive vote of 107,420 to 82,741. South Australia had already ratified again; Tasmania and Victoria followed in July, and Queensland accepted the Bill on September 2. Western Australia still hesitated

The colonies, in order to facilitate the passage of the Constitution Bill through Parliament, and at the suggestion of

[1] The vote was 71,595 to 66,228. *N. S W. P. P*, 1899, 2nd Session, p. 41; Wise, *op. cit*, p 282, gives 71,965.

[2] *Infra*, p. 237

[3] *Infra*, p 239.

Mr. Chamberlain, Secretary of State for the Colonies, sent federal delegates to London. Barton, Deakin, Kingston, and Fysh represented their respective colonies; Dickson represented Queensland; Western Australia, though the Bill had not been ratified there, sent Mr. (later Sir) S. H. Parker to represent her interests. The goldfields of Western Australia also sent a representative, while Mr. W. P. Reeves represented New Zealand, where there was some interest in federation and particularly in having the way left open for possible entrance later.

The Imperial Government had been little consulted during the framing of the Bill; now the Crown Law Office submitted five amendments, all affecting imperial interests. Chamberlain, when the delegates vigorously combated these suggestions and hinted that Australian opinion would seriously oppose any changes,[1] and insisted that they had no authority to accept amendments in a constitution which had been ratified by the people, yielded except in the demand that appeals to the Privy Council be retained. On this the Australians, both the delegates in London and the governments, the press, and the people at home, divided.

In 1891 the Draft Bill had provided that the decisions of the Federal Supreme Court, as it was then to be called, should be final, provided that the Queen might " in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's dominions " were concerned, grant leave to appeal from the Supreme Court's decision to the sovereign in Council.[2] The 1898 Constitution Bill as finally ratified similarly prohibited any appeal,[3] either from the state or the federal courts, except in cases, now from

[1] *House of Commons Papers*, May, 1900, p. 19; *Sydney Morning Herald*, March 18, 26, 30, 31.

[2] 1891 Draft Bill, chap. iii, cl. 6.

[3] Cl 74.

the High Court only, where the Queen might allow appeal if public interests were involved. Chamberlain, however, wished to retain the full right of appeal as it then existed, but after much controversy [1] a compromise was reached by which it was agreed that no appeal should be granted from the High Court on matters relating to constitutional rights and powers of the Commonwealth and the States *inter se* unless the High Court itself should certify that the question was one which ought to be determined by Her Majesty in Council.[2]

Even before the settlement of this question the Bill had been introduced into the House of Commons on May 14, 1900.[3] Both the Conservative and the Liberal Parties welcomed federation cordially, and the Bill passed the House of Commons with slight delay late in June, and passed the House of Lords early in July, receiving the royal assent on July 9.

Western Australia had already taken steps to make possible a referendum on the Bill; on July 31 it was approved by the decisive vote of 44,800 to 19,691. The union was complete,[4] and the six colonies became a Commonwealth on **January 1, 1901.**

[1] See especially Murdoch, *Alfred Deakin*, chap. xi, esp. pp. 196-205; the documents are reprinted in *N. S. W. P. P.*, 1900, vol. ii, pp. 149-211, and *House of Commons Papers*, 1900.

[2] Const. Act, sec. 74.

[3] For the changes which it was then proposed to make in the Bill see Quick and Garran, *op. cit*, p. 242; for the changes actually made (of which only the one in regard to appeals was of major importance) see *ibid*, p. 248 *et seq.*

[4] New Zealand had also shown some interest in the 1898 Bill, *Sydney Morning Herald*, February 3, 1900; Quick and Garran, *op. cit.*, pp. 233, 238, 251 *et seq.*

CHAPTER III

American Influence in the Provisions for the Senate

I. THE NEED FOR A SENATE

THE problems which arose in connection with the senate were among the most troublesome—even dangerous—with which the Conventions had to deal. The fundamental issue, which divided the Convention members repeatedly, was state rights. The representatives of the small colonies [1] naturally desired to preserve the individuality and influence of these smaller units as much as possible, and attempted to secure safeguards against the overwhelming numbers of their more populous neighbors. The representatives of the latter — New South Wales and Victoria—opposed the establishment of such safeguards, and were determined that ultimately numbers must prevail. Most, though not all, of the large state federalists were willing to concede equal state representation in the senate, but they insisted, in the face of bitter

[1] The *Year Book of Australia* (Sydney, Melbourne, etc) for 1897 gives the following populations, taken from the census of April 5, 1891:

New South Wales	1,132,234
Queensland	393,718
South Australia	320,431
Tasmania	146,667
Victoria	1,140,405
Western Australia	49,782

These figures exclude 59,618 aborigines. The figures given by T. A. Coghlan, Government Statistician of New South Wales, in *A Statistical Account of the Seven Colonies of Australasia* (Sydney, 1892), run a few thousand higher for each of the colonies.

and repeated objections from the small colonies, on limiting the power of the senate in financial legislation. The same division appeared in the discussion of responsible government and the senate's relationship to the executive, although here most of the small colony delegates were willing to give way. The issue again flared up hotly when the large colony representatives insisted on the inclusion of some means of settling disagreements between the two houses, and when some of them proposed to adopt a popular referendum for that purpose

In all these matters it was possible to turn to American experience for guidance or warning. The lessons to be drawn apparently were not very clear, for the debaters who appealed to the history of the United States generally found support for whatever view they already held, but such appeals were repeatedly used as arguments by both sides.

The necessity, or desirability, of providing for two houses in the federal parliament was accepted by the federal leaders in 1890, and adhered to by them thereafter. Even before the Melbourne Conference, Sir Henry Parkes wrote that parliament would consist of a senate and a house of commons,[1] and the resolutions which he presented at Sydney in 1891 were framed in accordance with this view.[2] Opposition to the proposal was rare and weak; it was adopted almost as a matter of course in both of the federal conventions. A small minority in the Assembly of Victoria made a vigorous attack on the senate and its powers during the consideration of the 1891 Draft Bill, and it was even moved that the provision for an upper chamber be struck out,[3] but

[1] *Supra*, p. 43.

[2] *Supra*, p. 59; Appendix II.

[3] By Sir Bryan O'Loghlen. Victoria *Parliamentary Debates* (hereafter cited as *Vic. Debs.*), vol. 66, p. 884 *et seq.* Hancock had taken the same attitude. See *The Age* of July 9, 1891.

the motion was defeated. Six years later, during the consideration of the Adelaide Draft Constitution in the New South Wales Assembly, a similar motion received the support of one-third of those voting,[1] and in Victoria a minority of the Assembly took a similar view.[2] Even in South Australia, the colony where the demand for a powerful second chamber was strongest, two Labour members of the Assembly were opposed to the establishment of a senate; [3] with them a desire for complete democracy overrode states rights feeling. These were, however, isolated instances, and represented no effective opposition to bicameral organization, which was accordingly accepted, as has been remarked, almost as a matter of course.

2. EQUAL STATE REPRESENTATION IN THE SENATE

The opposition to the equal representation of all the states in the senate was vigorous and vocal, though not very powerful or effective. Both sides appealed much to American precedent, for the Australian opponents of the provision found some of their strongest arguments in the objections which had been made to it at Philadelphia and in the close vote by which it had finally been adopted there. At the same time supporters of the provision could—and did—point to the success of the American Constitution and of equal state representation in actual practice. The opponents in Australia were always in a hopeless minority, but it was perhaps American example which kept them so, and the controversy

[1] *Infra*, p. 106

[2] See *Vic. Debs.*, 1897, p 882 *et seq.* (Hancock), and *The Age*, July 30; also *The Age* of July 28 and 29 (McKenzie and Maloney). Maloney declared that the United States would like to be rid of its Senate He cited no authority for this view.

[3] *S. A. Debs.*, 1897, pp. 226, 338 *et seq.* Ward, in the Council, took much the same attitude. Dibbs' proposal for unification, made in 1894, has already been mentioned. *Supra*, p. 71 *et seq.*

affords an excellent illustration of the way in which American precedents were sometimes used both by speakers who were well-informed and by those who either were not or who spoke too hastily.

Parkes' resolutions at Sydney in 1891 had provided for equal state representation in one house of Parliament,[1] and in that Convention the provision was accepted without question, though later it was often challenged.[2] Lyne of New South Wales came out against equal representation of the states in his campaign for election to the 1897 Convention, though he was the only successful candidate in the colony to do so.[3]

In presenting the resolutions upon which the opening general debate at Adelaide was held, Barton remarked that personally he believed that the states should be equally represented in one of the houses, though he had not so specified in the resolutions.[4] In the general debate a contrary view was presented by Higgins of Victoria, a lawyer of great ability and one of the best-informed members of the Convention. He quoted Bryce[5] to show that there had been no division of large against small states in the American Senate, and declared that the real protection of the small states would lie in the list of powers forbidden to the federal parliament and in the reservation to the states themselves

[1] *Supra*, p. 59; Appendix II.

[2] The Legislative Council of Victoria, during its consideration of the 1891 Bill, was warned against equality by Clark and Zeal. *The Age*, July 17, 1891; *Vic Debs.*, vol. 66, p. 391. In New South Wales the *Daily Telegraph* disliked the provision for equality (editorial of April 9, 1891), and Reid attacked it in the course of his speeches against the Bill. *N. S. W. Debs*, vol. 51, p 44 *et seq.*; *supra*, p. 65.

[3] *Supra*, p 81. The radical Sydney *Bulletin*, which might have been expected to oppose the arrangement, did not do so. *Supra*, p. 78.

[4] *Supra*, p 87; *Adel. 1897 Debs.*, p. 21 *et seq.*

[5] *American Commonwealth*, vol. i, p. 181 *et seq* (1888 ed.).

of large powers.[1] Wise of New South Wales, who replied, insisted that equal state representation in the senate was a necessity; he recalled the debate in the American Constitutional Convention on the subject and reminded Higgins of the outcome at Philadelphia.[2]

The Draft Constitution reported to the Convention by the Committee on Constitutional Machinery provided for six senators from each state,[3] but the opponents of the principle of equal state representation were not yet silenced Even after an agreement had been reached on the financial power of the senate, Higgins, who was somewhat noted for his devotion to non-popular causes, revived in an able speech the question of state representation. He believed that opposition to this provision was great and increasing, and maintained that this feeling should be given expression, even though it could not, for the moment at least, prevail. He argued that federation meant, for certain purposes, the obliteration of state lines, and recalled that Chief Justice Marshall had said: "We are one people for war; we are one people for peace; we are one people for purposes of commercial regulation". The allowance to an elector in New South Wales of only one-fourth of the voting power of an elector in South Australia, and to a New South Wales miner of only one-ninth of the voting power of a West Australian miner was "ridiculous". "Grouping is everything", he continued, "as Mr. Elbridge Gerry found in working the State of North Carolina", where, so Mr. Higgins said, Gerry so arranged the electoral districts that the anti-slavery

[1] *Adel 1897 Debs*, p 96 *et seq*

[2] *Ibid*, p. 105 *et seq.* See also Dobson. *Ibid.*, p. 199 Lyne supported Higgins, as did Isaacs, though less vigorously *Ibid*, pp. 157 *et seq*, 170 *et seq.*

[3] *Ibid.*, p. 434 *et seq.* (Barton's speech), and Clause 9 of part II of the Draft as reported. The 1891 Bill had provided for eight senators from each state.

people could not return a single member against the slave owners.[1] The provinces of Canada, Higgins urged, did not have equal representation, nor was representation entirely equal in Switzerland; Germany certainly had not adopted it, and in the United States it had been accepted by a very narrow margin, and with the great leaders against it.[2] Once agreed to, he reminded the delegates, equal representation could not be altered; at least it should be made possible for posterity to modify the provision, which could not be done if the consent of every state was to be required; in America "they would have altered their Constitution long since, but for that clause which makes it [equal representation] final". Higgins proposed the adoption of a sliding scale by which a state would have three senators for the first 100,000 of its population and an additional member for every additional 200,000.[3]

Deakin, like Higgins a Victorian, replied, asking the Convention to abide by the compromise of 1891; equal representation was absolutely necessary to secure the adherence of the smaller colonies and to make "a fair and equal contract".[4]

Lyne of New South Wales maintained his previous attitude, supporting Higgins. He spoke with considerable warmth, emphasizing the inequality of voting power under the arrangement proposed and warning that a body was being established which would, as in the United States, usurp

[1] *Adel. 1897 Debs.*, p. 641 *et seq.* Mr. Higgins was confused; the southern states have been subjected to "gerrymandering", but Gerry originated and applied the device in Massachusetts.

[2] An extended quotation from the rest of Higgins' speech, together with interpolations, is given in Appendix VI to illustrate the use of American precedents and also some of the limitations of the knowledge of America which was possessed by certain of the Australians.

[3] *Ibid.*, p. 649.

[4] *Idem, et seq.*

great powers. He offered to accept equal state representation, however, if a deadlock provision were included in the constitution.[1] Dr Quick of Victoria, in reply, charged Lyne with inconsistency—almost with insincerity—and with trying to kill federation.[2] Reid stated that he sympathized with the minority, but that equality was a necessity. Furthermore he was depending upon the adoption of a deadlock provision.[3] The Higgins amendment was decisively defeated.[4]

The Melbourne *Age* took much the same view of equal state representation as did Higgins. Its readers were reminded that many members of the Philadelphia Convention had opposed the provision; three-fourths of that body, including Franklin, Hamilton, Wilson, Madison, Mason, Randolph and Morris were declared to have favored proportional representation in the senate, though they were forced by Connecticut and Delaware to yield on this point.[5]

The hostility of the large colonies to the provision was even more vigorously shown during the consideration of the Adelaide Bill by the parliaments. In the New South Wales Assembly the criticism of the constitution of the senate began in a speech by Carruthers, who, in the absence of Reid, introduced the Adelaide Draft for the chamber's consideration.

[1] *Adel 1897 Debs*, p 651 *et seq*

[2] *Ibid*, 655. Carruthers of New South Wales and Trenwith of Victoria nevertheless joined Higgins and Lyne; Isaacs declared that he was putting his faith in the adoption of a deadlock provision. Glynn, who made an able presentation of the case of the small colonies, quoted the *Federalist*, no. 62 (he cited no 72), and Bryce, *American Commonwealth*, vol. i, p. 181 (1888 ed).

[3] *Syd. 1897 Debs.*, p. 666 *et seq.*

[4] By vote of 32 to 5. Sir Graham Berry joined the four already mentioned.

[5] Editorial, April 5. New Jersey and the New Jersey plan were not mentioned. *The Age* took much the same view in another editorial four days later, in which, furthermore, the populations of Nevada and New York were contrasted. On April 10 it endorsed Higgins' attack on equal state representation.

He explained that the Bill had been modelled on the American Constitution, whose authors had agreed to equal representation in the Senate by a very narrow majority, motivated by fear—British "troops were and for some time had been in occupation of some of the states, holding them as guarantees for the performance of the terms of the peace"[1]—and with some of the greatest of the federal leaders opposed. He cited Bryce[2] for the statement that if the Constitution had been submitted for the approval of the American people they would have rejected it. Subsequently, he asserted, a minority had forced new states to accept slavery and had caused the Civil War; recently a minority had rejected the arbitration treaty which had been negotiated with England. The senate, under the Bill, was to be the strong chamber in Australia, as in the United States. Parental rights, he continued, under the Bill would be subject to the control of the federal government, which would have the effect, he averred, of putting 800,000 New South Wales children at the mercy of the 750,000 small states people who would control the senate![3] Carruthers also made the point that secession was to be impossible. The tone of his remarks was characteristic of most of the speeches made by members of the dominant majority during the consideration of the Bill. A motion to strike out entirely the provisions for a senate was lost, but gained the support of almost one-third of those voting.[4] Proportionate representation was adopted; no state was

[1] Carruthers apparently had in mind the failure of the British to evacuate the northwest fur posts after 1783, and their complaint that the Americans had failed to pay the debts due to British merchants and to Loyalists. The British were not "in occupation of some of the states".

[2] *American Commonwealth*, vol. i, p. 26 (3rd ed.).

[3] *N. S. W. Debs.*, vol. 88 (1897, vol. i), p. 404 *et seq.*, especially pp. 420-427; also the *Sydney Morning Herald*, May 13. Millen later referred to the Connecticut compromise, as had Carruthers in this speech. *N. S. W. Debs.*, vol. 88, p 597.

[4] *Ibid.*, vol. 88, p. 1786; *Sydney Morning Herald*, July 8. The vote

to have less than three senators, and there was to be a total of not less than forty members.[1] The New South Wales Legislative Council adopted a similar amendment.[2] The Sydney *Daily Telegraph*, however, declared repeatedly that the change went entirely too far and was quite impossible.[3]

In the Victorian Assembly, Higgins, as always, fought hard and ably for proportionate representation in the senate. He was supported by Trenwith, and failed to carry his amendment by a narrow margin only.[4]

In South Australia members of the Convention who had fought for state rights were now defending the concessions they had made to the larger colonies. Thus Glynn remarked in the Assembly that equal representation in the senate was not logical, but had been agreed to by the large colonies in

was fifty-eight to twenty-six. An amendment requiring the dissolution of half of the senate at each dissolution of the house of representatives was passed. *Ibid.*, vol. 88, p. 1812 The penal dissolution of the senate was proposed. *Sydney Morning Herald*, May 29

[1] *N. S. W. Debs*, vol. 88, p 1962 *et seq.* The final vote was 40 to 14. *Ibid*, p 2003. This was an all-night session, and attendance was light. For further opposition to equal state representation see Ashton, *ibid*, p 636 *et seq* ; W. M. Hughes, *ibid*, p 646 *et seq.*; Ferguson, *ibid.*, p 1220 (he favored the German plan), MacDonald, *ibid*, p 1223 Equal representation was defended by Ewing, *ibid*, p 603 *et seq* ; O'Sullivan, *ibid*, p 689 *et seq.*; Waddell, *ibid.*, p. 1205 *et seq.*, and D. Thomason, *ibid*, p. 1235 All made considerable use of American experience

[2] *Ibid*, vol. 89, p 3103.

[3] Editorials of July 16, August 3, 4 and 30.

[4] The vote was 45 to 36. *The Age*, July 21, 28 and 29. *The Age* supported Higgins and in an editorial of July 29 called attention to the adoption of the amendment in New South Wales by a decisive vote. Isaacs and Monk opposed Higgins, appealing, as he and Trenwith had done, to American precedent Higgins, in addition to the arguments which he had advanced at Adelaide, now declared that when the arbitration treaty was rejected in the United States 2,404,833 people had blocked 62,622,250, and he contended that improved means of communication were an argument for greater unification *Vic. Debs*, 1897, p. 602 *et seq.*

order to make federation possible. He explained how the arrangement had been adopted at Philadelphia, and pointed out that at Adelaide some limitation of the senate's power had had to be conceded in order to secure federation. He assured the Assembly that in the United States there was no division between large and small states, noted that few state rights matters were being delegated to the Commonwealth, and suggested that the *form* of the senate's expression of its views on money matters mattered little; the decisive factor would be whether or not the senate insisted on being powerful, and that would depend upon public opinion.[1] He warned that the senate should not be made too strong.

When the Convention met again, at Sydney, a resumption —almost a repetition—of the debate on equal state representation in the senate occupied more than a day. Higgins repeated familiar arguments, pointing again to the lack of logic and justice in making a Tasmanian vote equal eight New South Wales votes, declaring again that the system had not been a success in the United States and that it had been adopted there only under compulsion, that it had caused the Civil War, had put a few rich men in control of the government, and that no conflict of state interests had even arisen to justify the arrangement; it had not been followed in other countries, and he held that to return to it would be to disregard all later experience.

Sir John Downer replied, remarking that the United States Constitution had not been changed because of the Civil War, and that Switzerland had really followed the United States system of equal state representation. The Australian senate, he urged, was to have no executive powers, and the larger states need have no fear.[2] Carruthers, however, insisted

[1] *S. A. Debs*, 1897, p. 136 *et seq.* He quoted from Hamilton, in the *Federalist*, no. 62, and from Bryce, *American Commonwealth*, vol. i, p. 184 (1888 ed.).

[2] *Syd. 1897 Debs.*, p. 267 *et seq.*

that talking of going back to American precedent was a waste of time; the United States had to keep its Constitution because it could not get rid of it.[1]

Kingston, who now made the statement, rarely suggested in these sessions, that his first duty was to the future nation rather than to his colony, replied that necessity justified equal representation even if logic did not. He added that he had just been in the United States and that he had just been talking with Mr. Bryce as well; he believed that the unpopularity of the American Senate was largely due to the manner of its election, and he reported that Bryce highly approved the Australian change to popular election. Kingston also commended the provision for varying the representation in the senate of new states admitted after the formation of the federation.[2]

Symon presented another general defense of equal state representation and of the American system. He denied that there had been any "slavish devotion to the Constitution of the United States", but he nevertheless believed that Higgins had produced no evidence that equal state representation was a failure in America. He quoted Lord Rosebery's reference to "the matchless Constitution of the United States" and Freeman's reference to the American Union as "exhibiting federalism in a perfect, or nearly perfect, form", and cited Justice Story's views to the same effect. Symon reminded the Convention that the Confederate States and South American countries had followed the United States. He denied that American federation had resulted from military necessity,[3] and he declared that he could find no authority who condemned the equal representation of the states, and

[1] *Syd. 1897 Debs*, p 270.

[2] *Ibid.*, p. 283 *et seq.*; *infra*, pp. 111, 205.

[3] He quoted Daniel Webster and Samuel Adams.

that he had certainly heard no condemnation of it while he was in the United States.[1]

Isaacs again stated his willingness to accept equal state representation as a necessity, though he could not do so as a principle, and insisted that there had been no principle involved in the United States.[2] He believed that the whole trend in the United States was away from emphasis on state rights and state sovereignty. He warned that the Victorian Assembly had barely accepted equal representation of the states and that the colony would go no farther [3]

Wise denied that the rule of an absolute majority had ever been a principle either in the British Constitution or in any of the constitutions of the Australian colonies; local interests had always been represented in spite of their small population, and he suggested that when the country voters considered the question the demand for proportional representation would lose much of its strength, in Victoria as elsewhere. At the same time Wise held that though there was "a diversity of interests" which needed protection, there was no diversity of interests which was likely to lead to conflict Population, he concluded, was to be represented in one chamber; these interests must be represented in the other.[4] Deakin added that if proportionate representation was all that needed to be considered, a single chamber would suffice. Equal representation in the senate, furthermore,

[1] *Syd. 1897 Debs*, p. 288 *et seq.* His tone was decidedly vigorous.

[2] He quoted from the writings of Foster, Dicey, Wheeler, Macy, Burgess, and Maine, and from Alden, *The World's Representative Assemblies* (Johns Hopkins University Studies, 1893, vol. xi).

[3] *Syd. 1897 Debs*, p. 303 *et seq.*

[4] *Ibid*, p 315 *et seq.* Wise quoted Story at length to show that the United States Senate was deliberately established to protect the states and to show their sovereignty. Barton endorsed Wise's view. *Ibid.*, p. 339 *et seq.* So did Peacock. *Ibid*, p. 327.

would force political parties to consider the interests and views of the smaller states. When the much-mentioned Nevada was brought up again, Deakin, who reminded the delegates that he had been in that state, agreed promptly that its interests needed to be considered. He was not disposed to sacrifice federation to proportionate representation.[1] The Convention apparently agreed; in a division the clause was kept unchanged by a vote of forty-one to five.[2]

The Victorian Assembly had proposed that the requirement of equal state representation in the senate should apply only to original members of the Commonwealth, a suggestion which was now followed.[3]

Late in the Melbourne session Higgins again criticized the constitution of the senate,[4] after he had attempted unsuccessfully to take out, or to limit, the provision for the special protection of equal state representation.[5]

3. THE ELECTION OF SENATORS

Another of the questions which received much attention, though it never became one of the critical issues, concerned the manner of electing senators. Should they be elected by the state legislatures, as was then done in the United States, or should they be chosen directly by the people?

[1] *Syd. 1897 Debs.*, p. 330 *et seq.*

[2] *Ibid*, p. 355. As at Adelaide the five were Berry, Carruthers, Lyne, Trenwith and Higgins. *The Age* at Melbourne reported after an interview with Isaacs that there was great dissatisfaction at Sydney because of the adoption of equal representation; many expected federation to fail, and the issue depended upon the action taken upon deadlock proposals. Issue of September 13.

[3] *Syd. 1897 Debs*, pp. 394-415. Several, though not all, of the small colony delegates were opposed to the change. The vote was twenty-five to twenty.

[4] *Melb. 1898 Debs*, vol. ii, p 2210 *et seq.*

[5] *Melb. 1898 Debs*, vol. i, p. 769 *et seq.*

The program of the Australian Natives Association, drafted on the eve of the Melbourne Conference of 1890, specified election of the upper house by the state legislatures.[1] Parkes' resolutions at Sydney the following year merely provided for the election of one-third of the senators at a time. The manner of electing them received little attention during the debates, which dealt rather with the powers of the upper chamber.[2]

The 1891 Draft Constitution, as submitted by the Committee on Constitutional Machinery, provided that: "The Senate shall be composed of eight members for each state, directly chosen by the houses of the parliament of the several states during a session thereof, and each senator shall have one vote. The term for which a senator shall be chosen shall be six years".[3] Half of the senators were to retire every three years instead of one-third every two years, as in the United States. Kingston moved to omit the requirement that the senators be elected by the state parliaments, leaving the parliaments to decide how senators should be chosen; he was inclined to prefer direct election by the people.[4] Griffith replied that all senators should represent the same kind of constituency, and that they ought to be closely in touch with the state parliaments. He added that in the United States members of the state legislatures were often elected because of their promise to support the candidacy of

[1] *Supra*, p. 46.

[2] Rutledge of Queensland expressed a dislike for election by the state legislatures. *Sydney 1891 Debs*, p. 69 *et seq.*

[3] Chap. I, Part II, Clause 9 of the Bill, both as reported (*Sydney 1891 Debs.*, p 285) and as adopted. Griffith commented briefly on these provisions in presenting the Bill. *Ibid.*, p. 253 A motion to reduce the number of senators from each state from eight to six was lost without debate or division. *Ibid.*, p. 285.

[4] *Ibid.*, pp. 285, *et seq.*, 287, 288.

some aspirant for the federal senate.[1] Cockburn considered the last point an objection to the system; state and federal issues should not, he believed, be confused. He preferred popular election, but, liberal though he was, he did not believe that Australia was ready for such a method. Deakin objected to allowing nominee houses to participate in the election of senators; he suggested that the selection be left to the popular chamber, an arrangement which, he pointed out, would be more in keeping with American practice, since in America both houses of the legislatures were elected by the people.[2]

In defending the clause as drafted, Playford stood squarely on American precedent; the provision had worked well in the United States; he knew of no desire there to change it,[3] and he preferred to follow American experience.[4] Apparently the Convention agreed with him, for in the division Kingston's motion was defeated by a vote of thirty-four to six.[5]

In the six years which followed democracy made progress, as the popularization of the federal movement itself testifies,[6] and the general debate which opened the 1897 Con-

[1] *Syd. 1891 Debs.*, p. 286

[2] *Idem*

[3] By 1891 there was some demand in the United States for such a change, as Kingston, citing Bryce, pointed out. (*American Commonwealth*, vol. 1, p 101, n 3, 1895 ed.)

[4] *Syd 1897 Debs*, p 287 Fitzgerald agreed

[5] *Ibid*, p. 289 The Sydney *Daily Telegraph* did not like the provision (editorial of April 1, 1891), and it was criticized in the Legislative Council of Victoria by Zeal, who preferred popular election *Vic Debs*, vol. 66, p. 392. In the same body Clark and Sir Frederick Sargood objected to the long term of senators *The Age*, July 17, 1891

[6] Such leaders as Nelson in Queensland and Forrest in Western Australia were, however, late converts. The federal program of the Sydney *Bulletin* called for the election of both houses of parliament on the same franchise. *Supra*, p. 78

vention revealed strong support for the popular election of senators. Barton early expressed his personal preference for such a method, though, as he remarked, he had not included such matters of detail in his resolutions.[1] Sir George Turner believed that the election of senators by the state legislatures had worked badly in the United States; he preferred election by the people, and introduced new problems when he went on to advocate election from a single constituency and provision for minority representation.[2] Isaacs supported Sir George with arguments drawn largely from a recent article by Senator Mitchell of Wisconsin, which described the bad results of election by state legislatures.[3] Symon still favored election by the state parliaments,[4] as he had done in his campaign advertisement before he was elected to the Convention,[5] and Sir John Forrest also argued strongly for the election of senators according to the plan adopted in 1891; that system, he pointed out, had worked well in the United States for over a century.[6]

The change in sentiment was reflected in the report of the Committee on Constitutional Machinery, which provided

[1] *Adel. 1897 Debs.*, p. 26; *supra*, p. 87.

[2] *Ibid.*, p. 39 *et seq*

[3] *Ibid.*, p. 176 *et seq.* The article appeared in the *Forum* of June, 1896. Other members who favored popular election were Quick, who dealt with it at some length, Downer, who announced that he had been converted since 1891, Reid, and Trenwith. *Ibid*, pp 188 *et seq.*, 210, 270, 331. Cockburn again referred to the evil effects of mixing state and federal issues in America *Ibid*, p. 340. Clarke favored the election of senators by the people, with each state forming one constituency as a means of preventing gerrymandering. *Ibid.*, p. 304.

[4] *Ibid*, p. 136.

[5] *Supra*, p 83.

[6] A Victorian member interposed that it had also worked very badly! Sir John retorted that there had been no attempt to change it, and it was not until later that other members emphasized the American agitation for popular election. *Adel. 1897 Debs.*, p. 248.

that senators were to be elected by the people, with each state forming one electorate, and on the same franchise as in the election of members of the other federal chamber. There were to be six members of the senate or, as it was now called, the "States Assembly", instead of the eight provided for by the 1891 Draft Bill; one-half were to retire every three years, as in 1891.

The qualifications for membership reflected the democratic tendencies of the new convention They were now to be the same as for the house of representatives, that is, the attainment of the age of twenty-one,[1] the qualifications for voting in an election of members of the federal house of representatives, three years' residence in the Commonwealth, and the status of subject of the Queen, acquired either through birth or through naturalization at least five years before election.[2]

When these clauses were reached in committee of the whole, Lyne desired that the states be divided into several electorates because of the great size of some of them, in order to make some semblance of a real canvass possible, but he did not press his point.[3] A proposal for four senators from each state instead of six was quickly rejected.[4]

Dobson of Tasmania disliked the substitution of popular election of senators for the 1891 plan of election by state

[1] The American Constitution provides, and the 1891 Bill had provided, that senators must have attained the age of thirty.

[2] These qualifications were the same as in the 1891 Bill except that the latter had required five years' residence within the Commonwealth instead of three The American Constitution requires that a senator must have been nine years a citizen, and that he must be, at the time of his election, a resident of the state from which he is elected. Article I, Sec 3, Par 3. Members of both houses were to receive an annual allowance of £400, a provision which was accepted in the end *Adel 1897 Debs*, p 1034.

[3] *Ibid*, p 668 *et seq*

[4] *Ibid.*, p. 670. Specific stipulation of "one man one vote" was promptly adopted *Idem.*

legislatures, and protested against making the basis of representation the same for both houses; property he complained, would receive no representation, but he gained no support or sympathy whatever, and quickly dropped his objection.[1] No significant changes were made in the clauses concerning the senate.[2]

Some dissatisfaction with these provisions was expressed in the interval between the Adelaide and Sydney sessions. In Victoria, *The Age* disliked the requirement that each state form one election district for senators, and its attitude was reflected in the Assembly's debate. Editorially it was asserted that the "constitution of the American Senate has never been good enough for the Great Republic of the West", and that the mode of senatorial appointment there had "utterly degraded the character of the higher branch of the American Congress"; corruption had been "continually linked with the name of that House". The expense of campaigning in a large constituency was also advanced as an objection to the single district.[3] Dislike of American institutions, or at least of the constant reference to them, was most completely expressed in the Victorian Assembly, when one member burst out: "Why I have hardly heard a good word said for America in this House before the present debate on federation. You had only to mention America and up went every conservative lip; but now, because it suits them, you hear about Bryce, Lecky, and the grand American Constitution", though little of Switzerland or of Germany, and this in spite of the fact that "every writer on the Ameri-

[1] *Adel. 1897 Debs.*, p. 671 Barton refused even to discuss the question.

[2] A suggestion that disputed elections be referred to the High Court, a point suggested by accounts of scandals in the United States, came to nothing.

[3] *The Age*, July 30. Senator Mitchell's article in the *Forum* was again used, and Isaacs quoted from it in the Assembly.

can Constitution told of the terrible corruption of the senate, which was not the people's House, but a superior House—the House of superior thieves ".[1] There had already been sharp comments on millionaire senators, their individual interests, and their decreasing identification with the interests of the community.[2] On the other hand, it was remarked that the remedy for corruption was not to be found in mere political machinery; the evil went deeper, and grew out of social tendencies and conditions [3] The provision for a single electorate was retained.[4]

In Western Australia, the views of Sir John Forrest were perhaps reflected when both houses struck out the requirement that each state form a single senatorial electorate. This proposal was considered at the Sydney session where Sir John argued that only the rich would be able to canvass a whole state, that cliques would be formed, and that the populous districts would dominate; he desired that the legislatures establish electorates [5] Higgins defended the single elector-

[1] *Vic. Debs*, 1897, p. 882 *et seq.*; *The Age*, July 30. Longmore had recently said that the example of the United States should not be followed; a more liberal constitution was needed; *The Age*, July 16. Maloney had objected to taking a slavish copy of the British, American, or any other constitution, *ibid*, July 23 Trenwith had been cheered when he remarked that the American Senate was not likely to be copied; *ibid*, July 28 In introducing the Bill Isaacs had remarked that it was modelled largely upon the Constitution of the United States *Vic. Debs*, 1897, p 524.

[2] Maloney and Graves; *The Age*, July 29 Harper had replied, summarizing Bryce's views. *Idem*. Trenwith had commented upon senatorial corruption. *Ibid*, July 28

[3] Smith, making use of Senator Mitchell's article *Idem*.

[4] *Idem*

[5] *Syd. 1897 Debs*, p. 361 *et seq* Personally he still preferred the 1891 plan of election of senators by the parliaments. Reid agreed. *Ibid.*, p 366 *et seq*. McMillan suggested that there be one electorate subject to change by the federal Parliament. *Ibid*, p. 368 *et seq*.

ate as a means of getting rid of local issues, and desired to have districts so large that wealthy men would have no advantage.[1] Dr. Quick warned the small colonies that their interests were safer under the single electorate, he was surprised to find Forrest in favor of election by districts.[2] The Convention decided to keep the single district, but subject to change by the federal Parliament, as suggested by McMillan.[3] This problem, or group of problems, was accordingly disposed of.

In this instance the Australians, satisfied at first to follow American practice, in the end found that practice out of date and subject to improvement, and made some changes which, though they were in keeping with liberal opinion in America, were not generally adopted there until more than a decade later.

4. THE SENATE AND MINISTERIAL RESPONSIBILITY

The really serious conflicts in regard to the senate, however, concerned not the manner of its election nor the details of its membership, but its power The smaller colonies, naturally intent on preserving their identity and ensuring their influence in the federation, demanded that the upper chamber be coördinate with the house of representatives, and jealously fought any proposal which threatened either the power or the prestige of the "states house". The larger colonies, on the other hand, were not willing to put the

[1] *Ibid*, p. 369. He also liked the Hare system of proportional representation (which had been recommended by other speakers). Downer, Kingston, Barton, and O'Connor favored the single electorate. *Ibid*, pp 371 *et seq*, 374 *et seq.*, 377 *et seq.*, 379 *et seq.*

[2] *Ibid.*, p. 377.

[3] *Ibid*, p. 390 *et seq.* There was a considerable demand for leaving the determination of electorates to the state parliaments. *The Age* was exasperated at the Convention's failure to follow the suggestions of the parliaments. Issue of September 14.

smaller states in the proposed union in a position to block legislation or to defeat the will of the popular majority. They argued particularly that the executive must be responsible to one house only, that financial control must be vested in that house alone, and that ultimately, in any matter, the "voice of the people" must prevail. At first the two chief issues were responsible government and the power of the senate in finance; later the same ground was covered again, the same controversy fought out, in dealing with deadlock provisions and the amending process.

Throughout the federal movement there was a general desire to retain the familiar British system of responsible government; though occasionally a small minority took a different attitude they cannot be said ever to have gained strong support. The question arose at an early stage. Cockburn suggested at the Melbourne Conference of 1890 that the American Constitution was not suitable to Australian needs because of its lack of provision for responsible government.[1] While the Queensland Parliament was considering the proposal for the 1891 Convention, Griffith expressed a willingness to abandon responsible government, which, he pointed out, had never been actually written into British constitutions; without altering a law the American form of executive, with ministers chosen outside parliament and for a fixed term of years, could be adopted. Responsible government, he maintained, was a new development and still on trial. He retained the views here stated until the end of the federal movement.[2]

The resolutions submitted by Parkes in 1891 provided for an executive to be composed of a governor-general and of advisers who should sit in parliament and whose tenure of office should depend upon possession of the confidence of

[1] *Supra*, p. 50 *et seq*

[2] *Qsld. Debs*, vol lxi (1890), p. 195; *infra*, p 247.

the house of representatives.[1] Griffith, who objected, as a delegate from one of the smaller colonies, to the restrictions imposed by the resolutions upon the financial power of the senate, commended the American provisions in regard to Congress and the executive, but he admitted that he did not like the separation of the legislative and executive branches of the government and that he believed that the ministers should sit in Parliament.[2]

Russell of New Zealand was another of the few men in the entire course of the federal movement who seriously challenged responsible government. He pointed to the danger in the part played by personal popularity in the making and unmaking of ministries, and to the disadvantages of administrations which constantly changed.[3]

Barton, who declared that he favored a strong senate, very definitely desired to retain responsible government, and to have responsibility to one house only,[4] as apparently did most of the federal leaders, but Downer immediately demanded that responsibility be to both chambers. He held that such an arrangement was necessary for the adequate protection of the rights and privileges of the states house; otherwise the house would be overshadowed by the influence of New South Wales.[5] Rutledge of Queensland admitted that the desire to retain responsible government was an obstacle in the way of the small states program,[6] but Kingston, another

[1] *Supra*, p. 59; Appendix II.

[2] *Infra*, p. 241; *Syd. 1891 Debs.*, p. 15 *et seq.* See also the comments of Munro and Playford on the executive powers of the senate. *Infra*, p. 124.

[3] *Syd 1891 Debs.*, p. 31 *et seq.*

[4] *Ibid*, p. 48.

[5] *Ibid*, p. 49 Thynne of Queensland agreed, as did Bird, the Premier of Tasmania, and Clark, also of Tasmania. *Ibid.*, pp. 52, 58 *et seq.* and 118.

[6] *Ibid.*, p. 71 *et seq.*

of the South Australian delegates who subscribed wholly to this small states program, was not certain that responsible government was essential.[1]

Wrixon, presenting the Victorian view on the appeal for equal power for the senate, flatly declared that the example of the United States had no bearing on the question since the American executive was not to be copied,[2] and Parkes concluded the general debate with a strong demand for British responsible government.[3] Most Australians, both in and outside the Conventions, agreed with him, but the minority, though small, included the able, influential, and persistent Griffith, Baker, and Downer.

The two latter, both South Australians, carried the question into the 1897-98 Convention, but they drew little on American precedent, turning rather to Switzerland, and moving amendments which would have established the Swiss type of executive in the Commonwealth.[4] Dr. Cockburn commended the suggestion of Sir George Grey, made in 1891, that the governor-general be elective,[5] and Gordon of South Australia assured the Convention that there was "a very strong body of educated opinion in England" against responsible government, and in favor of the American type of executive.[6] Symon, in arguing that coordinate houses and responsible government were quite compatible, remarked that responsible government was unknown to the framers of the

[1] *Syd. 1891 Debs*, p. 78 *et seq.*

[2] *Ibid*, p. 103 *et seq*

[3] *Ibid*, p 154 *et seq.*

[4] *Adel. 1897 Debs*, pp. 27 *et seq*, 210 *et seq* See also p. 133 *et seq.* (Symon); p. 345 *et seq*; and *Syd. 1897 Debs*, p. 782 *et seq.*

[5] *Adel. 1897 Debs*, p 345 *et seq.*

[6] *Ibid*, p 324 *et seq.*

American Constitution,[1] and reminded the Convention that ministers had been admitted to the legislature of the Confederate States of America Trenwith of Victoria, arguing the other side, advanced the novel idea that executive responsibility of a sort was provided in the American Constitution, which really had adopted a compromise between responsible government, of which he maintained the Americans had some knowledge, and autocratic government; he declared that the framers of the American Constitution " endeavored to make the chief administrator, and they did make him responsible to the Senate, and they considered the Senate responsible to the States " [2] In this Convention Barton stated the view of the majority, as Parkes had done in 1891, in declaring that neither the American nor the Swiss form of executive would do in Australia, and that responsibility to two houses was not practicable; [3] in the end provisions establishing responsible government were adopted almost as a matter of course [4]

5. THE SENATE AND FINANCE

The demand that the familiar forms of British responsible government be sacrificed to ensure the coördinate power of the senate accordingly failed, but the closely allied demand —a demand almost as contrary to British political principles —that the senate have power in finance equal to that of the other chamber, received stronger and more effective support.

The Parkes resolutions at Sydney in 1891 aroused the immediate dissatisfaction of the small colony representatives in providing that the popular chamber " possess the sole right

[1] *Adel. 1897 Debs.*, p. 133 *et seq* He cited John Fiske, *Critical Period*, and Bryce, vol. i, p. 278 *et seq.* (1895 ed.).

[2] *Adel. 1897 Debs.*, p. 334. He cited no authority in support of his statements and views.

[3] *Ibid*, p 380 *et seq.*

[4] *Ibid.*, pp. 908-916

of originating and amending all bills appropriating revenue or imposing taxation." [1] The American restriction on the power of the Senate requires that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills ".[2]

In the general debate which followed, and in which practically all the members participated, it was soon apparent that the senate and its powers were to be the center of controversy. The resolutions were intentionally drawn loosely to elicit opinions in this introductory debate, in which it developed that the extreme small colony delegates argued against imposing any restrictions whatever on the power of the senate, while the extreme large colony delegates argued against allowing the senate any power whatever in finance, and less extreme members took intermediate positions. Griffith, who followed Parkes, promptly challenged the latter's proposed restriction on the financial power of the upper house, declaring such limitations inconsistent with the independent existence of a body intended to represent the several states. Griffith admitted that the British Empire afforded no instances of coördinate houses, but he believed that the United States had demonstrated the wisdom of such an arrangement; at the same time he confessed that he disliked the American separation of the executive and the legislature. He recognized the possibility of a clash between the two houses and the ministry, but he suggested giving the senate a veto either in whole or in detail in all matters, and permitting it to reject, though not to initiate, financial legislation.[3]

[1] See Appendix II, and *Syd. 1891 Debs*, p 12. There had been no earlier discussion of this point, though Macrossan and Griffith had spoken in high praise of the American Senate. *Supra*, pp 51, 54.

[2] Art. I, Sec 7, Par. 1

[3] *Syd. 1891 Debs*, p. 16.

Munro, Premier of Victoria, replied, accusing Griffith of raising problems which the latter could not solve, and insisted that the division of financial power between two houses would paralyze the government. Reminded by Griffith of the United States, he declared that the situation there was entirely different, because in the United States the real executive power rested in the Senate and responsible government did not exist, and because the country was a republic. He approved Parkes' plan for constituting parliament, and believed that the equal power of the houses in general legislation was adequate guarantee of the interests of the states; supreme power in finance must go to the house of representatives.[1]

Playford, although he represented South Australia, a small colony, accepted the limitations on the financial power of the senate; his colony would prefer that the houses be co-ordinate, but he could not reconcile such an arrangement with responsible government, and to him Griffith's suggestion of a veto in detail on expenditure appeared impracticable. When the latter again called attention to the United States, Playford repeated Munro's reply that the United States did not have responsible government and that the executive power there was entrusted to the Senate. He asserted that in America the Senate was the dominant house, and insisted that responsible government could not operate in connection with such a body. Playford contributed a suggestion that the small states be protected by provisions against "tacking" or "riders".[2]

Sir Thomas McIlwraith of Queensland put the case for

[1] *Syd. 1891 Debs*, p. 23 *et seq.* In speaking of the Articles of Confederation Munro quoted Alexander Johnston, *The United States, Its History and Constitution.* The Melbourne *Age* of March 5, like Munro, commended the Parkes resolutions and considered Griffith's senate incompatible with responsible government.

[2] *Syd. 1891 Debs.*, p. 27 *et seq*

the small states sharply. When, he said, they were asked to federate and hesitated because of the threat to their power and nationality, they were offered a house in which, regardless of size and population, the influence of all colonies would be equal—a proposal which made federation possible. But then, when that had been agreed to, came a proposal that, "in the most important question that can possibly come before the legislature", the influence of the colonies was not to be equal Such a proposal, he continued, could only grow out of an assumption that the senate would represent the moneyed class, whereas actually the senate would be as popular and representative as the other chamber, a fact which made any restrictions quite unnecessary.[1]

Deakin resumed the large states argument He objected to granting the senate an absolute and permanent veto unless, at least, it was to be subject, like the lower house, to penal dissolution,[2] and suggested that if the senate was forced to pass some measures it might block others in a spirit of revenge. He reminded the Convention of the control of patronage exercised by senators in the United States, and of the resulting decline in the prestige and authority of the House of Representatives. Furthermore, he questioned the existence of any state rights or interests outside the great powers to be retained by the states, and requested an exact statement of the rights involved.[3]

Barton, in spite of his New South Wales connection, emphasized the need of a strong senate, remarking that each citizen was to have a "double citizenship", and that any weakening of the senate would be a weakening of popular

[1] *Syd. 1891 Debs.*, p. 30 *et seq.*

[2] When the ministry is defeated and appeals to the country rather than resign.

[3] *Ibid.*, p. 36 *et seq.* For a statement in reply see *ibid*, p. 55 (Baker). See also Forrest, *ibid.*, p 107

representation. He also suggested that the grant to the senate of large powers would tend to decrease the possibility of friction and jealousy among the states. He believed there would be a waste of brains and ability in first securing such representation in the senate as had commanded the respect of Americans, and in then depriving that chamber of authority, and he again warned the Convention against acting in such a way as to arouse dissatisfaction, if not rebellion Barton nevertheless desired responsible government, and with ministerial responsibility to one house only.[1] Sir Patrick Jennings agreed, and advocated a senate of the American rather than of the Canadian type. He remarked that Australians must know the constitutions of both of these federations, but that they should not slavishly follow either [2]

Rutledge of Queensland condemned "amalgamation", and appealed to the long and honorable record of the American Senate, quoting tributes of Andrew Carnegie and Lord Salisbury, and citing Bryce to show that the Senate, like the House of Representatives, was a popular chamber Rutledge pointed out, furthermore, that there had never been divisions in which the large states opposed the small states,[3] an argument which was later used by the large colony representatives. His arguments were later echoed by Sir James Lee-Steere of Western Australia, who added that such conflicts as arose between the two houses in the United States were invariably settled by compromise, and repeated Baker's opinion that the small colonies could not enter a federation in which their interests were not adequately safeguarded.[4]

[1] *Syd. 1891 Debs*, p 44 *et seq.*

[2] *Ibid*, p 61.

[3] *Ibid.*, p. 70 *et seq.*; Bryce, *American Commonwealth*, vol. i, p. 182 (1888 ed.).

[4] *Syd. 1891 Debs.*, p. 94. Lee-Steere had also been reading Bryce.

Fitzgerald, a Victorian member of the opposition to Munro, and Dibbs, then leader of the opposition to Parkes in New South Wales, supported the small states view. Dibbs, whose virtuous tone of justice and enlightenment must have been somewhat trying to his New South Wales colleagues, recalled that the Convention was traversing ground already covered in the Philadelphia Convention, in which the state rights party had finally triumphed; he was convinced that the large states must also give way at Sydney, and the more gracefully the better [1]

Wrixon of Victoria put the large states case in its bluntest form, asserting that " finance is government and government is finance ", and that an unrestricted veto would mean the grant to the senate of the control of finance and of the government. The effect would be to give four states, with a population of little over a million, absolute control over the action of other states with a population of two million and a quarter The example of the United States had no bearing since the American executive was not to be copied, coordinate houses, furthermore, were an impossibility—"if two men ride a horse one must ride first "—and in British governments the lower house must always prevail. Wrixon was, however, willing to allow the small states a larger representation in the lower house than their population justified, he would limit the proportion of ministers allowed to the larger states, and he would specify a class of bills which should be subject to the full veto power of the senate.[2]

Gillies of Victoria added little. He desired a strong senate but not the United States Senate; the United States government had worked well, but so had the Australian, and there was nothing to prevent the satisfactory working of British

[1] *Syd. 1891 Debs.*, p. 82 *et seq.* Dibbs cited Fiske's *Civil Government.*

[2] *Syd. 1897 Debs*, p. 103 *et seq.*

government in a federation The senate would be of value in securing deliberation.[1]

Clark appealed constantly to American precedent in supporting the small states argument. He joined the small number who questioned the necessity for establishing responsible government. He advocated the grant to the senate of power to veto financial measures in detail, though not the right to initiate such measures. To the objection that a minority might predominate, Clark replied that neither under representative government in general nor under the British system did the majority necessarily rule; he reminded the Convention that President Harrison, then in office, had been elected by a minority of the popular votes, and he outlined the idea of proportional representation. As for the American Senate and House of Representatives, if the latter had deteriorated, as had been suggested, the decline was probably due to the shorter term of its members; its speaker, however, was certainly the most powerful person in Congress, resembling the English Prime Minister more closely than did any other American official. Moreover, John Quincy Adams had returned to the House from the Presidency Clark declared that finance had never caused deadlocks in the American Congress, and pointed out that the Confederate States, which were not intent on flattering the Union, had paid it the greatest possible compliment in copying its constitution. Taking up Deakin's challenge to name a power which it was proposed to grant to the federal government and which conflicted with state interests, Clark named the control of commerce, citing Justice Story for the statement that through its possession of this power the American federal government had deprived the states of powers which the makers of the Constitution had intended to leave to them.[2]

[1] *Syd. 1891 Debs*, p 111 *et seq.*, especially p. 115 *et seq.*

[2] *Ibid*, p. 118 *et seq.*

McMillan of New South Wales took a moderate stand, advocating a senate which should be not only a guardian of state rights but also a second chamber, a stabilizing influence and a body capable of attracting outstanding men of ability. Save in confining the initiation of money bills to the lower house he believed that the chambers should be co-ordinate. He recommended the American system of conference committees for settling disagreements. He wished the members of the house of representatives to serve longer than in the United States, however, and he disliked the elements of suspicion and the checks in the American government.[1]

Hackett of Western Australia, in insisting that the senate must be a federal chamber, referred to "the most perfect system of federation which ancient or modern history has seen, that of the United States of America."[2] Donaldson of Queensland asserted that attempts to limit the financial power of the United States Senate had proved farcical, and repeated the argument that such limitation was quite unnecessary where both houses were popular.[3]

Parkes, in the reply which closed the general debate, utterly rejected the United States Senate as a model for Australia. Coordinate houses were an impossibility; he was "not prepared for any transcript of American institutions"; and he did not believe that the general principles of the British constitution could be bettered. The suggestion that the Australian senate should resemble the Senate of the United States, august as was the latter body, utterly amazed him; the United States Senate was the great executive authority of America, possessing powers beyond the comprehension of Australians, conducting its business in committees and

[1] *Syd. 1891 Debs.*, p. 131 *et seq.*

[2] *Ibid.*, p. 134 Cuthbert, of the opposition in Victoria, spoke in the same vein *Ibid.*, p. 141 *et seq.*

[3] *Ibid.*, p. 149.

in absolute secrecy. Giving equal financial power to two houses appeared to him to be utterly un-English and contrary to the development of constitutional government. Responsibility must be to one chamber alone. The granting of equal state representation in the senate was a vast concession in itself, although the passage of time might modify that. The small states might perhaps be guaranteed a minimum representation in the lower house; if not able to enter on such terms, Western Australia, whose Premier, Forrest, had opposed the view of Sir Henry, might best remain outside the union for a time.[1]

When the general debate had been concluded Parkes' resolutions were considered in committee,[2] where, as soon as matters of detail were reached, the small states delegates precipitated the first of the two crises which arose in connection with the question of the senate's power. Downer moved to omit the words which deprived the senate of its power to amend money measures, as a preliminary to a further motion to grant to the senate the power of veto in detail. In spite of Munro's warning that the issue might settle the fate of federation, the motion was tentatively accepted.[3] Wrixon proposed an amendment to Downer's motion, providing that the senate have power to reject but not to amend money measures, and upon this proposal the debate was held. Somewhat inauspiciously Cockburn declared that unless Downer's motion, or an equivalent, were adopted there would be no federation. Munro rejoined that if such a provision were adopted there would be none, and Parkes asserted that New South Wales, Victoria, Queensland, and Tasmania would certainly unite. Cockburn ob-

[1] *Syd. 1891 Debs.*, p. 154 *et seq.* Sir Henry's hostility to the American Senate had apparently developed since the drafting of his resolutions.

[2] This stage was reached on March 13.

[3] *Ibid.*, p. 182 *et seq.*

served that such a union would be unification rather than federation.[1]

The debate, which occupied the greater part of two days, was able and vigorous. Deakin foresaw deadlocks and the senate in perpetual conflict with the popular chamber, with the government, and perhaps even with the electorate. He approved a senate able to "revise and review" and to "exercise a very large and salutary power indeed in controlling legislation, and in controlling even the executive government", but he emphatically opposed an absolute veto in finance which might result in deadlocks. Australia might be able to follow the American or Swiss constitutions but not in connection with the British; "to introduce the American Senate into the British Constitution is to destroy both". And in any case the majority must rule.[2] Baker suggested the appointment of a committee of compromise, composed of a representative from each colony, as he said had been done at Philadelphia.[3] The suggestion was later repeated but not favorably received. Downer highly commended the Connecticut compromise—an experiment with coördinate houses which, theory to the contrary, had worked successfully.[4] Thynne, in supporting the small states view, informed the Convention that in the United States, in spite of all precautions taken to preserve state rights, the power of the states had declined.[5] Captain Russell, on the other hand, suggested that perhaps the small states had been offered more than they realized; he believed that the vital questions of the future would be social rather than financial.[6]

[1] *Syd. 1891 Debs*, p. 185.

[2] *Ibid.*, p. 185 *et seq.*

[3] *Ibid.*, pp. 190 *et seq*, 196, 202, 215.

[4] *Ibid.*, p. 198.

[5] *Ibid.*, p. 195.

[6] *Ibid.*, p. 196. Macrossan was inclined to agree. *Ibid.*, p. 210.

Many arguments previously advanced were repeated, but few new points were made. Barton, in a temperate speech which did much to moderate the tone of the debate, suggested that the third passage of money bills by the house of representatives be allowed to override the senate's veto in detail.[1] Sir George Grey favored full and unlimited powers for the senate. He held that the natural nobility of man could be trusted to settle disagreements; he desired neither an English nor an American but an Australian system.[2] Baker, however, supported the suggestion that the Swiss executive be adopted.[3] Sir Samuel Griffith reminded the delegates that there were forty-two legislatures with coordinate houses in the United States, and that responsible government in connection with two houses equal in power was in operation "all over the continent of Europe"; he was, however, willing to restrict the senate's action upon customs and annual appropriation bills.[4] Macrossan, also of Queensland, remarked in the course of an able speech that in America there had never been a division into large and small state groups; he believed that in Australia also parties rather than states would be the basis of division. He desired a strong and able senate (preferably elected by the state legislatures), capable of attracting the best men. He was sure that, deprived of executive authority, the senate would never overshadow the lower house. He opposed the granting of any additional representatives in the lower house to the smaller states—an attitude upon which Forrest of Western Australia differed.[5] Sir John Downer, in repeating his plea for houses

[1] *Syd. 1891 Debs.*, p 202.

[2] *Ibid*, p. 205 *et seq.*

[3] *Ibid.*, p. 213.

[4] *Ibid.*, p. 207. Sir Samuel neglected to name the European countries to which he referred.

[5] *Ibid.*, p. 209 *et seq.*, 212. Macrossan in closing observed that the Philadelphia Convention had taken five weeks to cover ground traversed at Sydney in two days.

as nearly as possible coördinate, suggested that something might be left to events and to evolution.[1]

Parkes made another patriotic appeal to follow the example of the mother country, and, charging some of the delegates with provincialism, stressed the generosity of the offer to the small colonies of equality in all save finance.[2] He held the British upper chamber to be "infinitely superior to any of the same character of which we know anywhere else", and he did "not make an exception of the Senate of the United States, because in the House of Lords no peer, no illustrious statesman, was ever stealthily approached with an intention to beat out his brains; but they had the Sumner incident in that great Senate of the United States of which hon members have talked so much". Griffith promptly objected that any proposal to make the House of Lords a model for Australia was quite out of the question.[3]

At the suggestion of McMillan, who was convinced that the delegates had at least reached the conclusion that the senate should not interfere with appropriations, Wrixon and Downer withdrew their amendments, and Parkes' resolutions were referred to the sub-committees which were now to be appointed.[4] At the close of the general debate the Committee on Constitutional Machinery (the sessions of which were secret), with the resolutions and the trend of the debate to guide it, proceeded to draft a constitution, which comprised its report to the Convention.

This draft constitution, which was reported to the Con-

[1] *Syd. 1891 Debs.*, p. 214 *et seq.*

[2] *Ibid*, p 216.

[3] *Ibid.*, p 221. Parkes withdrew a part of this implication of his remarks.

[4] *Ibid*, pp. 221, 224. The small colony delegates who were, of course, a majority, had amended out the words "and amending", a decision which was over-ruled in the sub-committee.

vention two weeks later by Griffith, the Chairman, provided that the senate should have coördinate power save in laws imposing taxation or appropriating annual supplies; these measures the senate could accept or reject but not amend, or, of course, initiate. "Tacking" and "riders" were carefully prohibited, and the senate was to have the right to return financial measures to the house with a request for amendments or omissions, though the lower house was left free to deal as it chose with such requests.[1]

In presenting the Bill Griffith recognized that its provisions would satisfy no one completely. In discussing the senate and its position he called attention to the acceptance by the committee of the principle that in a federation all laws, financial as well as others, must receive the assent of a majority both of the people and of the states. At the same time the grant of equal rights to the two houses might block all government. Therefore the senate had been given the power of veto, without which it would have been no legislative chamber at all, and had been given authority to make its views on changes heard; it could do anything, he remarked, but interfere with the carrying on of the government.[2] Baker declared flatly that the draft failed to provide for federal government. He listed four weaknesses which combined to make the senate a mere dummy. The senate could not initiate money bills, it could not alter them, responsibility was to be to one house only, and the ablest men would be attracted to the powerful lower chamber. Deadlocks Baker admitted to be possible, but there had been none in the United States during its hundred years of federal

[1] *Syd. 1891 Debs.*, pp. 254, 342; Clause 55. See Appendix IV. The Bill was reported on March 31. The meetings of the committees were secret and only the barest summaries were made public.

[2] *Ibid.*, p. 254. Griffith pointed out that just this system had worked well in South Australia.

history, and he quoted Woodrow Wilson and Bryce to show that the Senate had always refused actually to block government, and that it was responsive to popular will and opinion.[1]

The real fight came when Clause 55, defining the powers of the senate, was reached in committee of the whole. Baker moved the omission of all restrictions on the senate's equality, going, as he said, straight to the point. He described the clause as the most important in the Bill, and the question as the one which would determine whether or not Australia was to have genuine federation. Baker was supported by Cockburn, who warned the Convention of the tendency in the United States and Canada towards centralization, and insisted that state rights must be effectively buttressed.[2]

Deakin replied for the large states. He still held that no definition of state rights had been forthcoming, and saw no reason for safeguarding the senate's authority, when admittedly the senate was to be democratic and so nearly like the house of representatives. He still believed the example of the United States to be inapplicable since responsible government was not in force there, and he denied the possibility of responsibility to two houses, especially when one was not to be elected directly by the people.[3]

The warmth of some of Deakin's remarks (he referred to a union of " reactionary radicals " with " inconoclastic conservatives ") drew fire from the other side. Cockburn again joined in the debate and stressed the point that " the great

[1] *Syd. 1891 Debs*, p. 262 *et seq.* Bryce, *American Commonwealth*, vol. i, pp. 114 *et seq.*, 122 *et seq.* (1895 ed).

[2] *Syd. 1891 Debs.*, p. 342 *et seq.*

[3] *Ibid.*, p 343 *et seq* Deakin declared that the state rights party, the party of slavery, was not held in high esteem in America Cockburn replied that though some easy advantage might be gained from connecting slavery with state rights, the argument was superficial and of no real force.

function that Australia has to perform among nations is to work out the great social and industrial reforms with which we are face to face", a task possible only for local governments. All possible prestige must be left to the states, and a decline in that prestige, once started, would proceed rapidly. [1]

Griffith spoke for the bill as drafted. He was opposed to unification, but he considered that state rights were sufficiently guarded to make unification impossible.[2]

Munro abandoned argument and warned that the large states had been pushed to their limit; the compromise represented by the bill might perhaps be accepted by Victoria, though persuasion would not be easy, but Baker's amendment would make acceptance of the Bill quite impossible.[3]

A suggestion from McMillan that the senate be allowed a full veto on all save appropriation bills was blocked by Parkes, and the committee adjourned over the week-end [4] In spite of an inauspicious attack on Victoria and Deakin made by Thynne when the session was resumed, it was evident that a spirit of compromise was to prevail. Bird, the Tasmanian Premier, announced that his strong preference for coördinate houses had been over-ruled by his desire for federation, and for a federation which would include the large colonies; he was presently joined by Playford and Kingston of South Australia and Hackett of Western Australia,[5] and though Forrest declined to adopt their view.

[1] *Syd 1891 Debs.*, p. 345.

[2] *Ibid*, p. 346.

[3] *Ibid*, p 347. The Melbourne *Age* took the same stand in an editorial on April 1; on the whole, however, the editorial was optimistic about the future of the Bill

[4] *Ibid*, p 348 *et seq.* McMillan subsequently moved an amendment embodying his suggestion; it was lost without a division. *Ibid*, p. 365 *et seq.*

[5] *Ibid.*, pp. 352-359.

and Baker, Downer, and Dibbs protested with some heat at what they termed the desertion of several small colony delegates,[1] in a division the bill as drafted was upheld by a vote of twenty-two to sixteen, with Victoria casting all her seven votes against the amendment, New South Wales casting four against and one (Dibbs) in favor, Queensland four against and two in favor, while South Australia supported the amendment four to three, Western Australia four to one, New Zealand two to none, and Tasmania divided six votes evenly.[2] The small states had thus refused to risk federation for the sake of the complete equality of the houses. This famous "compromise of 1891", as it came to be called, which provided that the legislative powers of the two houses should be equal except that the senate could affirm or reject, but not initiate or amend, taxation measures or the annual appropriation bill, but prohibited at the same time "tacking" or "riders", and permitted the senate to return to the other house such measures as it could not itself amend with recommendations for omissions or amendments, seemed generally acceptable to the delegates, who apparently felt that they could recommend it to their respective colonies. There was, nevertheless, some criticism of these provisions during the consideration of the completed Draft Constitution in the colonial parliaments.[3]

[1] *Syd. 1891 Debs*, pp 359, 361 *et seq*, 364 *et seq.*

[2] *Ibid*, p. 365. See Appendix IV. Abbott of New South Wales, Lee-Steere and Wright of Western Australia, and Atkinson of New Zealand did not vote, Macrossan of Queensland had died, and Brown of Tasmania had been obliged to leave the Convention. Barton of New South Wales was absent at the time of the vote but later announced that he would have opposed the amendment. *Ibid.*, p 381.

[3] See Reid's criticism. *Supra*, p 65 The Legislative Assembly of Victoria adopted an amendment proposing to strike out the power of the senate to return a money bill to the house of representatives with suggestions. *Vic. Debs.*, vol. 66, p. 1075.

The same ground was again traversed when the task of constitution-making was resumed at Adelaide in 1897. Barton's resolutions, like those of Parkes six years earlier, provided that the house of representatives should "possess the sole power of originating all Bills appropriating revenue or imposing taxation",[1] words which brought from Baker a warning that eventually he would challenge the restriction on the financial power of the senate. He insisted that the senate must not be considered "a kind of glorified Upper House"; it would represent the people as fully as the house of representatives. Furthermore, in America "the Senate has the power practically of either appointing what we should call the Ministry or of concurring in their appointment. It has the power of making treaties; it has the power of appointing all public officers, and it is these powers which have preserved the right of the States intact during the hundred years in which the Constitution has existed".[2] It was at this point that Baker challenged responsible government, quoting Griffith's criticisms of it, together with the latter's recommendation of the American executive, and asserting that either responsible government would kill federation or federation would kill responsible government.[3] Canadian precedent he disposed of by denying that Canada was a true federation.

Turner, the Premier of Victoria, was quite willing that in ordinary legislation the two houses should be coördinate, but in money matters, even though the senate was to be more than a mere upper chamber, the house of representatives should predominate. The senate should have full

[1] *Adel. 1897 Debs.*, pp. 17, 22 *et seq.*; Appendix V. The 1891 version was "originating and amending."

[2] *Ibid.*, p. 27 *et seq.*, especially 30 *et seq.* Baker's exaggerated statement of the powers of the American Senate went unchallenged.

[3] *Supra*, p. 87, note 2.

power to reject all measures but not to amend or even to make suggestions in financial bills. Anticipating the adoption of a deadlock provision he held that deadlocks in finance should be broken in the same manner as those arising in other matters. As usual, he left the citation of precedents to others.[1] Higgins, a Victorian who always supported the extreme large states view, went farther. He disagreed thoroughly with Baker's stand, declaring that he was for responsible government and therefore against coördinate houses. He was unwilling to allow any financial power whatever to the senate.[2]

Wise suggested that in practice responsible government would be adequately protected if the senate were restricted in its power to amend the annual appropriation bill. He prophesied, as Russell and Cockburn had done six years earlier, that the real conflicts of the future would be caused by social rather than by financial issues.[3]

In a speech which illustrates well the close connection between the financial issue and the questions of responsible government and state rights, Isaacs, Attorney-General of Victoria and one of the ablest and best informed members of the Convention, displayed a detailed knowledge of the records of the American Constitutional Convention, which he interpreted from the large states point of view. After establishing the necessity for maintaining responsible government he declared that the American Senate had originally been intended to be an upper chamber—the saucer in which the hot tea was to be cooled. The compromise by which it was made to represent the states was suggested later. Even then, Isaacs added:

[1] *Adel. 1897 Debs*, p 41 *et seq.*

[2] Lyne agreed. *Adel. 1897 Debs.*, p. 157 *et seq.*

[3] *Ibid.*, p 105 *et seq.* Henry, a Tasmanian, favored this suggestion for financial limitation. So did McMillan. *Ibid.*, pp. 118, 220 *et seq.*

It was pointed out by what I may term the master minds of the Convention that there was no danger to the smaller States, because the State rights . . . are undoubtedly guarded and preserved by the Constitution, and, as Mr. Wilson, of Pennsylvania, almost in the words of one of the representatives here, said, it is not the question of State rights that was so much at issue, as the question of State interests . . . Men do not vote according to the size of their States.

If, he continued, the American Senate was purely a states house and not an upper chamber, why did senators vote individually rather than by states, and why was the financial power of the Senate limited? Isaacs recalled the great dissatisfaction of some of the American delegates with the Senate as constituted, and the narrowness of the margin by which the compromise was accepted.[1] Agreeing with previous speakers that coördinate houses and responsible government could not exist together, he argued against allowing any financial power whatever to the senate; the decision of the America Convention had been reached by a margin so narrow that it could not be accepted as a precedent

Downer expressed, as he had done in 1891, the extreme small states view. He believed that the senate must be a states house to an even greater extent than in the United States, for the "American Constitution . . . was founded largely on the writings of Montesquieu", who, if he had written a century later, would have written differently. The American Constitutional Convention had sought to establish a senate at least coördinate with the house of representatives; it confined the initiation of money bills to the lower house from analogy with the House of Lords, but it more than made up for that when it "bestowed upon the Senate executive powers, gave them the control of foreign concerns, and internally gave them the control of all appointments".

[1] *Adel. 1897 Debs.*, p. 170 *et seq.*

As a result, the American Senate had naturally attracted, he thought, all the more brilliant intellects of the country, and by that, more than from any other cause, it had become the pre-eminent body Nor, he insisted, was the American Senate by any means lacking in financial power. If the senate in Australia was to be elected by the people it would be in perfect touch with the people, and it should then be made co-ordinate with the other chamber. Since it could not be given executive functions, as in the United States, care must be taken to compensate, and there should be no financial restrictions upon its power.[1] Similarly Sir Philip Fysh, who had attended the 1891 Convention as Premier of Tasmania, though he wished to preserve responsible government and though he expressed the belief that if the United States were to make a new constitution, checks and balances would be discarded in favor of responsibility of the executive, nevertheless hoped that the senate would now be given full power to amend money measures. He held "as strongly and sturdily . . . as do the members of the United States Legislature that the principle of State rights must be thoroughly conserved and reserved"; the American and not the Canadian federal system must be followed[2]

Forrest, still Premier of Western Australia, proposed to "stand by the old British Constitution", retaining responsible government, rather than to turn to the United States or Switzerland for precedents, but he also joined in demanding full power for the senate save in the initiation of money bills and amending of appropriation measures.[3]

[1] *Adel. 1897 Debs.*, p. 206 *et seq.*

[2] *Ibid.*, p. 243 *et seq*

[3] *Ibid*, p. 246 *et seq.* Sir John referred to the American Senate as a "far more distinguished body" than the House of Representatives, and again as "the strongest, ablest, and most august body in the United States." *Ibid.*, p. 249.

Reid referred to the problem of the powers of the two houses in money matters as the " Scylla and Charybdis " of the federal enterprise. No model existed for Australia, he believed, although the British Constitution furnished the best example available. The American Constitution was " absolutely impossible ", discredited by party machines and corruption. He insisted that the executive must be responsible, and responsible to the house of representatives. Contrary to British precedent, the senate must have some financial power, but the American system, whereby the two houses were given equal powers with respect to money measures, was workable only where the treasury was so full that both houses, working as hard as they were able, could not get rid of the money, even by the extravagant grant of pensions. He was willing that the senate be empowered to reject all bills but not to amend either appropriation or taxation measures.[1] State rights, Reid maintained, were adequately guarded by specific clauses in the constitution and by the reservation to the states of all powers not granted to the federal government.

Deakin, as in 1891, presented the large states view with great force. Like Barton, he was quite willing to accept the 1891 Bill as a federal constitution, without change. As for the American Senate, Deakin cited Bryce[2] for the statement that if the United States Constitution had been submitted to the people it would have been rejected. Furthermore, the Australian " Council of States ", as Deakin preferred to call the senate, was to have continuity, fixed tenure, and to be above dissolution, making it superior to the other chamber. Freedom from much of the drudgery of legislation and from the obligation to criticize the administration, and the prestige which the chamber would derive from popular

[1] *Adel. 1897 Debs.*, p. 273 *et seq.*

[2] *American Commonwealth*, vol. i, p. 26 (1895 ed).

election, would make the senate very attractive to able men. The ability of the American Senate to attract the best men was due, he believed, to its longer and fixed tenure rather than to its executive powers. The senate would be represented in the ministry and would be in a position greatly to influence it; even making the ministry responsible to the other chamber would not entirely compensate. The money power, however, naturally belonged to the house of representatives—even in the United States, where that house was the inferior chamber, it had the sole right to initiate money measures. State rights were safely guarded by the senate's coördinate power in general legislation and, as Reid had pointed out, by specific clauses in the Bill. Bryce and the records of Congress would have to be searched carefully to find matters with which state interests were even remotely connected. "A strong permanent and influential Council of the States", he declared, "is an indispensable element in a federal Constitution; but it is no derogation from its dignity to require that, in order to secure safe practicable workableness, it must undertake the high offices of revision and reconsideration, rather than of initiation or detail in finance. . . . When two men ride the same horse one must sit behind". He again cited Bryce[1] for the statement that after a hundred years it was impossible to distinguish between the Senate and the House of Representatives as the guardian of state rights in America. He was convinced that states, their size, and their interests would never form the basis of parties in Australia, and he thought it much more likely that the great Australian states would overawe the federal government than that the reverse would happen.[2]

[1] *American Commonwealth*, vol. i, p. 185 (1895 ed.).

[2] *Adel. 1897 Debs*, p. 288 *et seq.* At the end of this speech the gallery had to be rebuked for its burst of applause.

Cockburn nevertheless still maintained that money measures involved state interests and suggested that an appropriation bill might discriminate among harbors in providing protection for shipping, and that an excise or a tariff might greatly affect the industries of particular states.[1] Another of the South Australians, Howe, expressed the opinion that unless the senate were to be given co-equal powers, even in finance, federation might not come for some time.[2]

Barton, in the reply which closed the general debate, recognized the necessity for protecting the individuality of the states not only through safeguards written into the constitution and through the supreme court, but through a states house as well. In all legislation except pure money bills—measures solely for the purpose of appropriation or of taxation—the senate should have coordinate power.[3]

In presenting the report of the Committee on Constitutional Machinery, Barton remarked that though much of the new Draft Constitution had been taken from the 1891 Bill the provisions in regard to the "States Assembly", or senate, had been modified in several respects. The "compromise of 1891", in dealing with the highly controversial problem of the powers of the senate in financial matters, had required that any bill appropriating public revenue or imposing a tax must originate in the house of representatives, and had provided that while the senate might reject, it could not amend taxation measures or the annual appropriation bill. Nor could the senate amend any law in such a way as to increase a proposed charge upon the people. The limitation on the senate's power to originate money bills was now to

[1] *Adel. 1897 Debs.*, p 343 *et seq.* Cockburn reminded the large colonies that the size of states was subject to change; New York had been a small state when the Union was formed.

[2] *Ibid.*, p. 356.

[3] *Ibid.*, p. 388 *et seq*

apply only to bills having for their *main object* the appropriation of public revenue or the imposition of taxes, and the prohibition of the amending of taxation measures was omitted. The 1891 provision that the senate could suggest alterations to the house of representatives was retained, applying to appropriation bills.[1]

The first clauses to be considered in committee of the whole were those defining the financial powers of the senate.[2] Turner failed to carry a motion to extend the prohibition upon originating money bills in the senate to include all money measures.[3] Over the protest of Barton the name of the upper house of Parliament was changed back to "senate" from "states assembly".[4]

Reid moved to restore the 1891 provision which prohibited the senate from amending taxation as well as appropriation measures, thus raising the question which Turner presently asserted was the most important before the Convention.[5] A new and long debate on state rights was precipitated. If the states were to contribute equally to the federal treasury the power proposed to be allowed to the senate would be fair, but so long as contributions continued to be according to population he could not agree to such a concession to the upper chamber. Furthermore, "under a system of responsible government there must be only one

[1] *Adel 1897 Debs*, p 441 *et seq.*

[2] This was at the continued insistence of Forrest and in spite of the strong protest of Barton The Western Australians had to leave early and Forrest wished to participate in the consideration of these clauses and the voting upon them.

[3] By a vote of 26 to 22 Two small colony delegates joined the twenty large colony members *Ibid*, pp. 470-479.

[4] By 27 to 21. *Ibid*, p. 481 *et seq*

[5] Reid remarked, however, that the 1891 wording conceded too much to the senate, and he disliked the 1891 provision which permitted the senate to make suggestions about money measures. *Ibid.*, p. 484

financial house". Power to reject was a fair and reasonable arrangement; to more than that he could not agree.[1] Turner now regretted, as far as political tactics and bargaining power were concerned, the concession of equal state representation in the senate. The large states had made that concession in order to make federation possible; the small states must now take as broad an attitude. He could never persuade the people of Victoria to accept the clause as it stood. Like Reid, he would allow the senate to reject even taxation measures, but "if the other colonies are not prepared to accept what has been fairly regarded as the 1891 compromise . . . Federation will be impossible".[2]

Downer replied, declaring that the small colonies had sacrificed all that they could, and were able to concede no more; they had agreed to limitation of the power of amendment, which in America was unlimited. He still saw no difficulty in making the executive responsible to two houses, and he adhered to the clause as drafted.[3]

Wise again suggested that the important questions would be social rather than financial. He agreed, however, that Victoria would not accept the clause as it stood, and took the attitude that the gain to the small states was not worth the danger that was being created.[4] Kingston, who had been one of the draftsmen of the 1891 Bill, supported its solution of the problem, declining to join his South Australian colleagues in demanding a modification.[5]

Sir John Forrest, speaking sharply, described the 1891 arrangement as a defeat for the small colonies; it was not a

[1] *Adel. 1897 Debs.*, p 484 *et seq.*

[2] *Ibid.*, p. 485 *et seq.*

[3] *Ibid.*, p. 486 *et seq.*

[4] *Ibid.*, p. 487 *et seq.*

[5] *Ibid.*, p. 488 *et seq.*

compromise. Then, and in 1897, the small colonies desired coördinate houses He charged some delegates with really wanting a one-chamber parliament, and with advocating a senate which would actually be subservient to the house of representatives. If the upper house was to have no financial power the small colonies would not federate; let New South Wales and Victoria federate by themselves.[1]

Higgins replied, also rather sharply, asserting that allowing equal power to two houses in finance was impossible; in America the Senate's large privileges were workable only because the ministers were elected by the people—a misstatement such as he usually avoided.[2] The debate continued in much the same strain, large state representatives holding to the 1891 agreement as the most that they could concede and small state delegates threatening non-ratification if the clause under consideration should be changed. McMillan of New South Wales varied the regular order by joining the small colony speakers; he saw little difference between allowing power to suggest amendments, as in 1891, and to amend, as now allowed. Nor did he believe that the senate would abuse its right to amend.[3] Neither he nor other Australians who touched on this point seem to have fully understood the extent to which the American Senate influences financial legislation through its power to amend.

Deakin, always effective in a crisis, put the case for responsible government and against allowing the senate to amend, with great clarity. A tariff, or other tax bill, was distinctly an administration measure, introduced usually on a mandate from the people, after careful preparation, and then subjected to detailed consideration in the lower house.

[1] *Adel. 1897 Debs.*, p 490 *et seq.*

[2] *Ibid.*, p. 491 *et seq.* Cockburn correctly challenged the last statement, which Higgins refused to modify materially.

[3] *Ibid.*, p. 504 *et seq*

Must the measure then be subjected to the same minute treatment in another chamber, "elected not on the same basis, not at the same time and not with the same mandate, so far as one half at least or it may be as far as the whole Chamber is concerned?"—was the measure to be returned with some parts accepted, others refused, and some partly accepted? Deakin believed that the senate should treat these bills from a broad point of view, considering whether the house of representatives had obeyed the mandate of the people, and looking through the measure for any glaring inequalities that might have crept in. Once its suggestions had been made, responsibility rested squarely on the other house, and the people could act accordingly. The large states were yielding to the small states power absolutely to block legislation on some thirty-five subjects. The restrictions on the senate were to be only those which experience had shown to be necessary to the transaction of public business. Furthermore, Deakin considered that wrangling over petty financial details would be beneath the dignity of the senate. To a large extent the executive would have to be responsible to the two houses; unless the senate accepted the executive's proposals no government could carry through its program. Even without the power to amend money bills the Australian Senate would "stand beside the Senate of the United States of America as the next most powerful Second Chamber in the civilized world", attracting the best men, deriving its authority directly from the people, protected from being overshadowed by the lower house through sheer numbers. The power of the house of representatives was confined to thirty-five subjects, none involving state interests; the house was forbidden to "tack", and the contents of appropriation bills were now to be restricted [1]

[1] *Adel. 1897 Debs.*, p. 506 *et seq.* Deakin endorsed Turner's statement that the electors of Victoria could not be induced to accept the clause as it

Symon, who replied, again stressed the dignity of the senate and the need of equality as of right rather than by concession. As for the American Senate, which he did not wish to see in Australia because its executive functions would destroy responsible government, its high position was due to its power to amend money bills and to its executive authority. The former power he desired for the Australian senate, but no more. Responsible government would not be affected, the people could be trusted, and a powerful senate was the very essential of federation.[1] Glynn, also of South Australia, presently stated that after the formation of the American Union, although state rights was one of the first questions to agitate politics, it did so only academically, and certainly was not a matter of large against small states. Bryce had shown conclusively that the Senate's power to amend money bills had not led to deadlocks,[2] nevertheless Glynn joined Kingston in holding to the terms of the 1891 agreement.[3]

Carruthers of New South Wales, who was arguing that the will of the people must ultimately prevail, and who, in that connection, recommended the referendum for the settlement of deadlocks, declared that the American Civil War was wholly the result of the Senate's determination to impose slavery upon a majority of the states.[4] Henry of Tasmania announced his intention to vote with the large

stood. He pictured Sir John Forrest as the benevolent autocrat of Western Australia, able to do as he liked since he held both parliament and the electorate in the hollow of his hand, a situation which Deakin contrasted with that of the other premiers

[1] *Adel. 1897 Debs.*, p. 515 *et seq*

[2] *American Commonwealth*, vol. i, p. 186 (1895 ed.).

[3] *Adel. 1897 Debs*, p. 536 *et seq.*

[4] *Ibid.*, p. 541 *et seq.*

colony representatives because he believed such action was necessary to prevent the postponement of federation.[1]

Barton, who had used an opportune cold to secure adjournment, and with adjournment perhaps an opportunity for members to consider and discuss the situation, now, in moderate tone, joined the large colony delegates in expressing the opinion that the clause as it stood would retard federation. He, too, objected to allowing the senate to wreck the financial policy of a government, thus destroying the responsibility of the executive as well, and he strongly maintained the fairness of the 1891 compromise Barton had gathered, he said, from the remarks of Forrest that there was considerable doubt as to whether Western Australia would join the federation; if that were true, Western Australia should not force upon the other colonies an arrangement which the latter did not want. Tasmania and South Australia were showing some disposition to compromise, but not Western Australia. Barton ended with a strong appeal not to imperil federation.[2]

Kingston pointed out that in considering the Draft Bill of 1891 South Australia and Tasmania had accepted the compromise without objection.[3] Brown of Tasmania agreed; he added that he wished to imperil neither responsible government nor federation. He was joined by Lewis, another Tasmanian, in supporting Turner's view [4] McMillan, faced, if he failed to vote with his New South Wales col-

[1] *Adel. 1897 Debs.*, p. 549 *et seq.*

[2] *Ibid.*, pp. 549, 552 *et seq.*

[3] *Ibid.*, p. 562 *et seq.* He later withdrew the statement as far as Tasmania was concerned, when he was informed that the Assembly had amended the provision. *Ibid.*, p. 567.

[4] *Ibid.*, pp. 564, 565 *et seq.* Moore of Tasmania objected to their stand, and Solomon vigorously attacked Kingston for deserting his South Australian colleagues. *Ibid.*, pp. 567 *et seq.*, 569 *et seq.*

leagues, with the prospect of a tie, which would then be resolved in favor of the small colonies by the vote of the Chairman of the Committee, Sir Richard Baker, announced that he would support the 1891 compromise. In the division the Turner amendment was carried by a vote to twenty-five to twenty-three.[1]

The various Assemblies and Councils had not previously shown great breadth of view, and now, lacking the leadership of the premiers, all of whom were attending Queen Victoria's Jubilee, they again laid themselves open to charges of provincialism.

The most radical departures from the Bill were taken in New South Wales, where it received earliest consideration. Both chambers were hostile to it, and both rejected entirely the agreement reached in regard to state rights and the senate.[2] The Assembly approved amendments which would have deprived the senate of all power in finance, struck out the provision for federal control of customs and excise, and

[1] *Adel 1897 Debs*, p 575. See Appendix IV. The Bill now read: "The Senate shall have equal power with the House of Representatives in respect of all proposed laws except laws imposing taxation and laws appropriating the necessary supplies for the annual services of the government, which the Senate may affirm or reject, but may not amend. But the Senate may not amend any proposed law in such a manner as to increase any proposed charge or burden on the people"; a provision against "tacking" was also included. (Appendix III.) Brown, Henry and Lewis of Tasmania, and Glynn and Kingston of South Australia, voted with the solid delegations of New South Wales and Victoria. The votes of Baker, the Chairman, and of Hackett of Western Australia, who was absent, would have made a tie. The Western Australian delegates left a few hours after this vote. Afer a long debate—almost a wrangle—subsection 3 was modified to read: "laws imposing taxation, except laws imposing duties of Customs on imports, shall deal with one subject of taxation only, but laws imposing duties of Customs shall deal with duties of Customs only". *Ibid*, p. 603. The clause was then passed with no more amendments. *Ibid*, p. 611.

[2] *Supra*, p. 106 *et seq.*

left the Commonwealth practically without means of raising revenue.[1]

In the Victorian Legislative Assembly, a decisive majority favored further limitation of the power of the senate and the provision for the use of the referendum in case of deadlocks. Much hostility to American institutions was evident.[2] The changes met with the approval of the influential Melbourne *Age,* which had been very critical of many clauses in the Bill, but which now declared that a crude, clumsy, hasty and inept draft, a discredit to the Convention, had been changed into something for which the people might be asked to vote [3]

In the South Australian Parliament the debates maintained a fairly high level. Baker, in the Council, moved to give the senate full powers in finance, but his motion was defeated.[4] In both houses, nevertheless, the small states view prevailed. The Assembly adopted an amendment providing for the amendment of taxation measures by the senate.[5]

In Tasmania both houses adopted amendments permitting the senate to amend money measures.[6]

The parliaments forwarded their proposed amendments to the Sydney session, and many controversial questions were

[1] The proposed amendments are summarized in the *Sydney Morning Herald* of August 5 and 27, and September 1.

[2] Longmore wished the Adelaide Bill cast aside, and a fresh start made (*The Age*, July 16); Murray believed a better constitution could be secured. Federation was not made a party issue however; Carter, the Opposition Leader, was strongly for federation. *The Age*, July 22.

[3] Editorials, August 24 and 30.

[4] By a vote of 18 to 13. *S A. Debs., 1897*, p. 129 *et seq.*

[5] For other changes, see N. S. W., *V. P. L. C.*, 1898, vol. i, p. 81.

[6] At the Sydney session the clause requiring appropriation measures to originate in the house of representatives was modified verbally and amended to allow the senate to initiate bills involving incidental fines or fees. *Syd. 1897 Debs.*, pp. 467-481.

thus reopened. A proposed amendment of the West Australian Council, giving the senate equal power with the house of representatives in tax measures, precipitated another state rights debate. Sir John Forrest based his argument squarely on the rights of the states. He urged that the power was a very important one; the power of veto was valuable but not always easy to exercise; the states had an interest in the form in which taxation was imposed. He protested that the senate should not be made an inferior body; senators were now to be popularly elected; the danger that states would combine was not real. He paid high tribute to the American Senate and its success.[1] Fysh and Symon agreed with Sir John's views, but both conceded that the power to amend money bills was not essential to the senate and could be sacrificed to the necessities of federation.[2] Downer was less compliant. He protested that the essentials of federation were being more and more cut away; consolidation would be the result. He, like Forrest, recommended the American Senate in glowing terms; no doubt it had made mistakes, "but that the American Senate has not always been a body held in the highest respect not only in America but in the civilized world" he absolutely denied; the Senate, he added, had been successful largely because of its perfect balance, and it had not been abandoned. Actually state rights issues had never arisen—establishing a desirable precedent for Australia.[3] He perhaps meant rather to say that the state rights controversies which had arisen in America had not divided senators according to the size of their states.

[1] *Syd. 1897 Debs*, p. 481 *et seq.*

[2] *Ibid*, pp. 487 *et seq.*, 491 *et seq.*

[3] *Ibid.*, p. 492 *et seq.* He added the familiar statement that many of the powers of the American chamber were not being granted to the Australian Senate; the process of reducing its authority must not go farther. *Ibid.*, p. 492 *et seq.*

Reid undertook to dispose of the American Senate as a precedent. He said:

> We must get rid of the veneration which my hon. friend seems to entertain for the Senate of the United States We are framing a constitution today under vastly different circumstances and I hope I am not too radical when I say with perhaps considerably more enlightenment than was vouchsafed to the framers of the American Constitution.

The world, he maintained, had advanced; there were many in America who considered the Senate's basis of representation monstrous, but no American political leader could afford to attempt reform because of the chamber's great power. He added:

> There is no doubt that the Senate has worked wonderfully well in past years; but as time goes on, even public opinion is coming to the conclusion that the Senate of the United States has been vastly overpraised . . . I assert, without the slightest fear, that the reputation of the United States Senate is vastly lower today than it was twenty years ago, and deservedly so . . .

One reproach was that it contained too many wealthy men. Reid accused the usually thoroughly British Forrest of being a plain Yankee when it came to the United States and the American Constitution, and objected that the Convention was framing a Constitution for Australia, not America, and that Australian principles and habits of thought must be considered. Australia, he was convinced, desired a British Constitution. Reid objected especially to the American financial system, citing the high tariff and the pension grants. Equal representation, he concluded, was a great concession, and all that the large colonies could yield.[1] Sir Edward Braddon replied that for the delegates from small colonies

[1] *Syd. 1897 Debs.*, p. 498 *et seq.*

the acceptance of the popular election of senators was a considerable concession, which could well be balanced by permitting the senate to amend taxation bills; Adye Douglas took a more vigorous attitude, inquiring, in the course of his remarks whether Australian senators must be corrupt because American senators had been so, and whether Australian senators would have to be millionaires.[1] As at Adelaide, however, some of the Tasmanian and South Australian members feared that insistence upon the amending power would wreck federation, and the amendment was defeated.[2] *The Age* declared that federation had been saved only by a few Tasmanian delegates; the real question, however, was that of deadlock provisions, which would now come before the Convention.[3]

6. THE SENATE AND DEADLOCK PROVISIONS

The whole question of state rights and of the power and prestige of the senate had to be threshed out again in dealing with proposals of methods for settling deadlocks. In the United States no provision is made for any further action when the two houses of Congress fail to agree. In practice a joint committee—a committee quite unknown to the Con-

[1] *Syd. 1897 Debs*, pp 506 *et seq*, 508 *et seq* Clarke, however, announced that although he had voted with the delegates of the small colonies on this question at Melbourne he would now accept the limitation on the powers of the senate. Hackett, on the other hand, now proposed to support the amendment. Higgins and Barton opposed the amendment; Glynn, of South Australia, joined them, citing the United States and Bryce, but against the small colonies' view.

[2] *Ibid.*, p. 537 *et seq.* The vote was 28 to 19. James of Western Australia, Brown, Clarke, Henry, Lewis, and Fysh of Tasmania, and Glynn, Kingston and Symon of South Australia voted with the New South Wales and Victorian delegations; O'Connor of New South Wales did not vote.

[3] Issue of September 15 Such clauses in regard to the senate as those dealing with qualifications for membership, details of election, vacancies and the conduct of business, caused little difficulty.

stitution—often succeeds in effecting some compromise to which both houses agree, but if compromise fails the measure is lost, or at least postponed. To many Australians such an arrangement did not seem adequate, and with the grant to the senate of coördinate powers in all matters save finance, and of a veto even in such legislation, a strong demand arose for the inclusion in the constitution of some provision for breaking possible deadlocks.

The demand was scarcely heard in 1891. Thynne suggested the use of the referendum to end disagreements,[1] and Wrixon complained that the Draft Bill as submitted to the Convention made no provision for finality if the senate should try to block a financial measure,[2] to which Baker replied that there was no such provision in the American Constitution.[3] McMillan had already remarked that no doubt conference committees would be employed by the two houses, as in the American Congress.[4] The only motion on the subject came from Wrixon, who moved the insertion of a clause making possible a joint session to settle deadlocks; a majority of the combined houses should decide the issue. Griffith opposed the motion, and FitzGerald condemned "mechanical devices", advising reliance on moderation and justice for the successful operation of the constitution. The amendment was lost, though Deakin remarked that some similar provision would no doubt eventually be found necessary.[5]

At Adelaide, in 1897, a much stronger sentiment in favor

[1] *Syd. 1891 Debs.*, p. 214.

[2] *Ibid.*, p. 259 *et seq.* See also Barton's suggestion on this point. *Ibid.*, p. 202; *supra*, p 132.

[3] *Syd. 1897 Debs.*, p. 262 *et seq.*

[4] *Ibid.*, p. 131.

[5] *Syd. 1897 Debs.*, p. 367 *et seq.* See also the Sydney *Daily Telegraph* for April 9, 1891.

of some safeguard became apparent in the introductory general debate. Turner desired full opportunity for compromise, but he also favored the inclusion of some means of resolving deadlocks, and suggested either the dissolution of both houses, which he apparently considered adequate for most cases likely to arise, or the employment of a referendum.[1] O'Connor preferred a second submission of the bill to the senate and then, if necessary, a joint session of the houses.[2] Higgins favored the use of the referendum or, if that could not be adopted, a dissolution of both houses, which he seemed to believe would bring agreement.[3] Reid proposed that the senate be limited to thirty-six members and the house of representatives to sixty, and that deadlocks then be settled in a joint session.[4] Trenwith urged the referendum; a joint session did not guarantee that ultimately the will of the people would prevail. He even suggested that the house of representatives might be allowed to over-ride the senate by passing a bill three times, with a general election preceding the third vote.[5]

The representatives of the small colonies tended to oppose the inclusion of any deadlock provision. They urged that such an innovation would weaken the senate, and they pointed to the success of the American federation, which lacked any such "safety valve",[6] though Dobson, a Tasmanian and an extreme conservative, favored a dual referendum, apparently because it required a majority of the states as well

[1] *Adel. 1897 Debs*, p. 41 *et seq*

[2] *Ibid.*, p. 52 *et seq.*

[3] *Ibid.*, p. 105. See also the Melbourne *Age* for April 15, 1897.

[4] *Ibid.*, p. 279 *et seq*

[5] *Ibid.*, p. 333 *et seq*, and (later), p. 1157 *et seq.*

[6] See, for example, Braddon and Fysh. *Ibid*, pp 66 and 244. McMillan of New South Wales took the same attitude, also citing the United States. *Ibid.*, p. 220.

as a majority of the people for the enactment of the bill.[1] The opponents of these suggestions received some support from a few large states representatives, notably Barton, who believed the proposals which had been advanced to be inconsistent with the principles both of federal and of responsible government.[2]

The draft constitution reported by the Committee on Constitutional Machinery included no deadlock provision, but late in the Adelaide session three plans were advanced and, so far as that session was concerned, rejected. Wise moved the insertion of a new clause which allowed the senate to be dissolved after a dissolution of the house of representatives had failed to end a deadlock.[3] Higgins moved for a simultaneous dissolution of the houses as soon as the deadlock occurred.[4] Isaacs proposed a referendum.[5] The supporters of these plans pointed to the American Civil War as an argument in favor of providing some "safety-valve".[6] Isaacs declared that in practice the United States resorted to a referendum every four years, and that all the American states save one made use of it.[7] The opponents of these proposals did not appeal to American experience. O'Connor and Symon objected to deadlock provisions on principle, as they had done during the general debate.[8] Fraser believed

[1] *Adel 1897 Debs.*, p. 198.

[2] For Barton's views see *ibid.*, p. 387 *et seq.*

[3] *Ibid*, p. 1150 *et seq.* The motion was lost by a vote of nineteen to eleven. *Ibid.*, p. 1168.

[4] *Ibid.*, p 1152 *et seq.* The motion was lost by a vote of twenty-four to seven. The Melbourne *Age* approved of this plan. Issues of March 30 and 31, April 6 and 9.

[5] *Ibid.*, p. 1169 *et seq.* His plan was rejected by a vote of eighteen to thirteen.

[6] *Ibid*, p 1162. (Mr. Isaacs.)

[7] *Ibid*, p. 1171.

[8] *Ibid.*, pp. 55 *et seq.*, 1151 *et seq.*, 1156 *et seq.*

that deadlocks did no harm, and were occasionally a good thing [1]

Though the plans advanced at Adelaide were rejected by decisive votes, the question was really only postponed; the members of the Convention desired time in which to consider the problem, and wished to give the press and the parliaments an opportunity to make suggestions and comments.[2]

During the consideration of the Adelaide Draft Bill by the colonial parliaments, the New South Wales Legislative Assembly agreed to an amendment providing for the settlement of deadlocks by a popular referendum—a referendum, that is, in which a majority of the electorate, regardless of state lines, should decide the issue.[3] The *Daily Telegraph* took the same attitude.[4] In the Victorian Assembly Deakin succeeded in carrying Wise's plan for a double dissolution of the two houses, and Isaacs also carried his plan for a referendum.[5] Isaacs cited American precedent, as he had done at Adelaide.[6] In Tasmania the Assembly declared against the inclusion of any deadlock provision, but suggested that, if there must be one, the house of representatives should be dissolved and if no agreement could then be reached the bill should be considered passed if it received the

[1] *Adel. 1897 Debs*, p. 1155. See also Abbott, *Syd. 1897 Debs*, p 568 *et seq.*

[2] This question of deadlocks tied in somewhat with the problems of equal state representation in the senate. *Supra*, p 105 (Messrs. Reid, Lyne and Isaacs). It was also connected with the manner of constituting the senate. *Supra*, p 158 (O'Connor).

[3] *N. S. W. Debs.*, vol. 89, p. 2003 The vote was forty-seven to ten. The radical changes proposed by the Council so reduced the power of the senate that deadlocks would not need to be reckoned with.

[4] Editorials of July 16, August 3, 4, and 30.

[5] *The Age* of August 20, 21, and 24. The votes were, respectively, thirty-four to twenty-one and thirty-three to twenty-one.

[6] *Supra*, p 158.

support of at least four-sevenths of the house of representatives and three-sevenths of the senate.[1]

The question had, accordingly, to be dealt with at the Sydney session. The same plans were advanced and much the same arguments were used. Many of the large colony representatives would have preferred a popular referendum in which state lines were disregarded; failing that they supported whatever plan seemed to give the most weight to numbers. Many small colony members would have preferred no provision whatever, but recognizing presently that some plan would certainly be adopted, they tried to secure the one least harmful to the states and to the power of the senate.

Both sides made some appeal to American precedent, but the lesson of American experience was not plain and had little effect on the outcome. The struggle, which was not ended until the Melbourne session, became a contest between the supporters of the various solutions which had been proposed.

Few new arguments were advanced McMillan, in opposing the adoption of any means of solution, reminded the Convention that in the United States legislation had to run three gauntlets—the two houses of Congress and the President. Australia was to have but two, and one of these should not be weakened[2] Dr. Quick, on the other hand, believed that in some respects the Australian Senate would be stronger than the American; some check was needed as a compensation—preferably a referendum or a double dissolution.[3] Fraser, who would have preferred no provision, was very hostile to the referendum; he had found a compilation of subjects upon which referenda had been held in the

[1] Quick and Garran, *op. cit.*, p. 185.

[2] *Syd. 1897 Debs.*, p. 547 *et seq.*

[3] *Ibid.*, p. 551 *et seq.*

United States and which he labelled "trumpery" and trifles.[1]

O'Connor, who did not like the referendum because he believed it took from legislators a sense of responsibility which they ought to retain, nevertheless recognized the possibility of conflicts such as had led to the American Civil War. Furthermore, party organization dominated American politics and would not permit deadlocks; in Australia some safety valve was needed.[2]

Deakin took much the same view, following an outburst from Kingston, who took occasion to condemn "unification" and who threatened to stump South Australia against the Bill if the popular referendum should be adopted.[3] Deakin pointed out that, as in the United States and Canada, deadlocks would occur not through a grouping of states but when the two houses were controlled by different parties. In the United States, where responsible government did not exist, deadlocks settled themselves; in Australia, where the executive must take sides, some method of settlement was essential. State rights would not be involved, and the referendum could be trusted; if any subjects could be named in which state interests were involved he would specifically exempt them from the action of the referendum. As for unification, that, for most matters, was what was desired.[4]

Symon summed up the opposition of the smaller colonies to the referendum forcibly, and in a tone almost as uncompromising as that which Kingston had employed. Deadlock provisions, he repeated, were unnecessary and a temp-

[1] *Syd. 1897 Debs.*, p. 565 *et seq.* He advocated settlement by conferences, as in the past.

[2] *Ibid.*, p. 573 *et seq.* He favored a double dissolution and then, if necessary, a referendum.

[3] *Ibid.*, p. 579 *et seq.*

[4] *Ibid.*, p. 581 *et seq.*

tation to the executive; "to introduce the referendum is to introduce a principle foreign to the federal system which we are creating", and to "rob equal representation of all its strength and of all its virtue". Nor was there any place for the referendum under responsible government. The dissolution of the senate was safeguard enough; if opinion were inflamed a campaign and a referendum would only make the situation worse. The senate, as in America, should be an effective check on the executive—which, it seemed to him, was represented in Australia by the house of representatives.[1]

Barton, who still believed deadlock provisions to be unnecessary, but who recognized that some means of solution would probably be adopted, and Turner, who advocated a dual referendum, succeeded in moderating the tone of the debate,[2] but Walker presently described the referendum as an appeal from the more intelligent to the less intelligent,[3] and Glynn declared that the referendum would be fatal to the senate.[4] He also condemned it because the voters would be swayed by propaganda, and cited American experience on the point. Wise warned the Convention that the referendum had been the weapon of despots from the time of Julius Caesar through that of Napoleon III,[5] but Reid and Isaacs nevertheless supported it. They agreed in holding that the American Constitution was inadequate for Australia and for new conditions. Reid insisted that the world had advanced since 1788, and added that "there is no country in the world where the people in a broad, massive, honorable

[1] *Syd. 1897 Debs.*, p. 589 *et seq.*

[2] *Ibid.*, pp. 619 *et seq.*, 628 *et seq.*

[3] *Ibid.*, p. 689.

[4] *Ibid.*, p. 691. See also *ibid.*, p. 570 (Gordon); p. 611 (Howe); p. 615 (Leake); p. 670 *et seq.* (Clarke); p. 705 *et seq.* (Grant).

[5] *Ibid.*, p. 647.

sense have less to do with the government of the country than they do in the United States"; the voice of the people in America could not be heard. Like Deakin, he proposed to safeguard state rights specifically and insisted that in matters not so exempted the will of the majority must prevail. He acknowledged that the dissolution of the senate was a great concession on the part of the small colonies, and he admitted that unless state interests were specifically exempted, as he suggested, the national referendum was unreasonable. The dual referendum, however, was not definitive, and would not suffice.[1]

Isaacs stated that deadlocks were very frequent in America, though there they did not block all administration; in Australia, under responsible government, such occurrences would be much more serious. He later declared, as he had done before, that the referendum was in general use in the United States, that "millions of people" there were governed by state constitutions in which the principle was embodied, and he added that there was even a strong movement in favor of the popular initiation of legislation. He agreed that the small colonies must not be pushed too far, but he urged that the dual referendum was quite fair.[2]

Solomon presently took occasion to protest against appeals to American and other precedent, complaining:

> We have had the American Constitution, and the Swiss Constitution, and slabs of the Canadian Constitution hurled at us from all sides *ad nauseam*. We have had nothing else but this American Constitution from all sides of the House, and to bolster up every kind of opinion, and I have come to the conclusion that the American Constitution is such a many-sided one that it can be used to back up every argument on every possible side of the federation question. . . .

[1] *Syd. 1897 Debs.*, p. 648 *et seq.*

[2] *Ibid.*, p. 659 *et seq.*

He wished that the statistics of the Colonies and all reference works on the American, Canadian and Swiss Constitutions had been burned before the Convention opened.[1]

The consideration given to the issue was long, the tone of the discussion often sharp, and the decisions reached highly complicated. After two days of general debate at Sydney it was voted to include a deadlock provision,[2] and the problem thus became the method to be adopted. Symon successfully moved a plan for the dissolution of the senate if a dissolution of the house of representatives had first failed to end the disagreements.[3] After protracted debate Wise carried a motion for a simultaneous or double dissolution of the houses.[4] A proposal made by Lyne for a national referendum was defeated,[5] as was Turner's motion for a dual referendum, to be used if a double dissolution had failed.[6] A plan sponsored by Carruthers and Reid, providing for a joint session of the two houses if a double dissolution failed, was adopted.[7] A two-thirds majority was to be required for the passage of the bill.

According to the Sydney settlement, then, the executive was given a choice between using the consecutive dissolution or a simultaneous dissolution to be followed, if necessary, by a joint session in which a two-thirds majority must be secured for the success of the disputed bill. The arrangement was clumsy, and it was recognized that the matter must be reconsidered at Melbourne, in the final session of the Convention.

[1] *Syd. 1897 Debs.*, p. 746 *et seq.* (especially 747).

[2] *Ibid.*, p. 708 *et seq.* The vote was thirty to fifteen.

[3] *Ibid*, pp. 709-738. The objections raised and the suggestions advanced were very involved.

[4] *Ibid.*, p. 924. Symon's plan was still in the Bill.

[5] *Ibid.*, p. 927 *et seq.* The vote was thirty-six to ten.

[6] *Ibid.*, p. 930. The vote on this motion was twenty-seven to eighteen.

[7] *Ibid.*, p. 974 *et seq.* The vote was twenty-nine to twelve.

Late in the Melbourne session the whole question was accordingly reopened. The Convention refused to take out either the provision for the successive or the simultaneous dissolution,[1] though both were vigorously attacked.

Isaacs then attempted to strike out the provision for a joint session, appealing for the dual referendum instead. He attacked, incidentally, the 1891 Bill and, with it, the American Constitution, exclaiming:

> Why, what was the basis of the Constitution of 1891? I say again, it slavishly followed in that regard as in others, the American Constitution—a Constitution framed not on the basis of following the people's will; but the American Constitution, as the Bill of 1891, was formed on the doctrine of checks and balances.

The Philadelphia delegates, he asserted, hated democracy, and the difficulty of working a Constitution of checks and balances was becoming more prominent every day. Profesor Macey [Macy] and Woodrow Wilson had been pointing out the advantages of the British system and, with others, were moving from congressional government to cabinet government, "from the tyranny of the Legislature to control by the direct will of the people".[2] Recalling, apparently, episodes in the Philadelphia convention, Isaacs said that the American Constitution had been adopted in a situation "where the small states threatened to call in military aid, and where the large states threatened to use military force".[3] He moved an amendment providing for the use of the dual referendum.[4]

[1] *Melb. 1898 Debs.*, vol. ii, pp. 2134, 2157.

[2] *Ibid.*, vol. ii, p. 2172 *et seq.*, esp. p. 2180 *et seq.*

[3] See the remarks of Bedford of Delaware and Morris of Pennsylvania, reported in Madison's Notes under the dates June 30 and July 5.

[4] *Ibid*, vol. ii, p. 2214. He had first moved for the omission of the provision for the joint session, but withdrew that. *Ibid.*, vol. ii, pp. 2211, 2213.

Wise replied, insisting that the dual referendum lacked finality and that the national referendum was unfair to the smaller colonies. Swiss precedent he dismissed because of the difference in size and conditions. In America, he remarked, the use of the referendum in some form in all of the states except Delaware was simply a commentary on the lack of confidence reposed in state legislatures. "In some states, as we know", he declared, "Parliament is not allowed to meet oftener than once in two years, and even then in order to limit its capacity for mischief as much as possible, it is not allowed to remain in session for a longer period than six weeks".[1] He maintained that the referendum in any form struck at the roots of parliamentary government because a minority could remain in power without discredit even though it was unable to carry through parliament the measures which it advocated.[2] The referendum was an appeal from the instructed to the ignorant; government by referendum meant government by the press.[3] After further debate the referendum was again voted down, as at Sydney,[4] and the plan for a joint session was finally retained without a division.[5] Symon then proposed that his provision for a successive dissolution of the two houses, the solution to which the Convention had first agreed, be taken out since it marred the Bill; permitting the alternative was a "rank absurdity". This action was taken, and the Constitution Bill, as adopted by the Convention, provided

[1] He quoted Oberholtzer on the referendum in America (*ibid.*, vol. ii, p. 2190) and Cree, *Direct Legislation by the People*, on corruption in America The Australian parliaments, he urged, were not corrupt, responsible government was in effect, and there was no need for a referendum.

[2] *Ibid.*, vol. ii, p. 2193.

[3] *Ibid.*, vol. ii, pp. 2195, 2199.

[4] *Ibid.*, vol. i, p. 2221 *et seq.* The vote was thirty to fifteen.

[5] *Ibid.*, vol. ii, p. 2247.

for a simultaneous dissolution to be followed, if necessary, by a joint session in which a three-fifths majority [6] of the total membership of the two houses was required for the passage of the bill.[1]

7. SUMMARY

In the provisions for the senate, then, the Australian conventions always had the American Senate in mind. The small colonies would have been content to follow it in detail; the large colonies, whose interests it did not serve, regarded it critically from the beginning. The senate provided for by the 1891 Draft Bill was closely modelled on that of the United States—in the equal representation of the states, in the manner of election, in the qualifications for membership, in the periodical retirement of part of the membership, in continuity, and in financial power. The chamber was not, of course, given such executive powers as were entrusted to the American Senate. The Constitution Bill of 1898 followed American provisions somewhat less closely. The senate was now to be popularly elected. Special qualifications for membership were removed. The senate was made subject to dissolution, and its powers were somewhat lessened by the constant possibility of dissolution, followed, perhaps, by a joint session if it should carry its opposition to the will of the other house too far. In all these matters the experience of the United States was consulted. Sometimes the influence was positive, and the Australians found that they could not do better than adopt American practice; sometimes it was negative, and led to an attempt to better American procedure, but seldom were American precedents forgotten, though occasionally they were not thoroughly understood.

[1] This was modified before the final ratification of the Bill. *Supra*, p. 96; *infra*, p. 239.

CHAPTER IV

The House of Representatives and the Powers of the Federal Legislature in Australia and the United States

I. THE HOUSE OF REPRESENTATIVES

There was general agreement both in 1891 and in 1897-98 that the house of representatives should be elected by the people and on a population basis. Representatives of the smaller colonies occasionally demanded that they be guaranteed a minimum representation,[1] and in 1897 it was agreed that each original state should have at least five members, regardless of population.[2] The corresponding provision in the American Constitution guarantees each state only one member of the house of representatives.[3]

The only serious controversy in regard to the house of representatives arose in connection with the provisions relating to its size. The 1891 Draft Bill had directed that until Parliament should otherwise provide there should be one representative for every thirty thousand inhabitants, a provision which suggests the number mentioned in the American Constitution,[4] but the Adelaide draft provided that the house

[1] See also the suggestions of Wrixon and Parkes. *Syd. 1891 Debs*, pp. 104, 156. At Adelaide, in 1897, Solomon submitted a sliding scale for representation in the house of representatives; he urged that the preservation of state rights necessitated the adoption of such a scale. *Adel. 1897 Debs.*, p. 710 *et seq.*

[2] Const. Act, Sec. 24; *Adel. 1897 Debs.*, p. 714 *et seq.* In 1891 the number agreed upon was four.

[3] Art. I, Sec. 2, Par. 3.

[4] 1891 Bill, Cl. 24; U. S. Const., Art. I, Sec. 2, Par. 3. The requirements do not coincide; in America "the number of representatives shall

of representatives should always be as nearly as possible twice as large as the senate. O'Connor, the author of this provision,[1] urged that the membership would thus be kept down, and that the house would never be put in the position of having to reduce its own size; increases in its membership would come only through the admission of new states or through an increase in the number of senators allowed to each state.[2] Turner objected to the proposal, charging that it was simply intended to prepare the way for a provision for breaking deadlocks by a joint session of the two houses. He preferred the American plan for determining the number of members,[3] and moved that the clause be modified; he desired one representative for every fifty thousand of population, subject to change by the federal parliament.[4] Isaacs, in supporting Turner, turned to the United States and cited precedents for Turner's plan.[5] Downer, supporting O'Connor, argued that since the Australian senate was not to have such executive powers as those possessed by the American Senate, precautions should be taken to prevent it from being overshadowed by the other house.[6] The Victorians failed to defeat or modify the provision,[7] but the question was reopened

not exceed" one for every thirty thousand. Congress is required to reapportion representation every ten years in accordance with the census returns.

[1] *Adel. 1897 Debs.*, pp. 435 *et seq.*, 436, 692, 701.

[2] *Ibid.*, p. 683 *et seq.*

[3] *Ibid.*, pp. 686 *et seq*, 688 *et seq.* Glynn of South Australia agreed, remarking that increases in size had been effectively checked in America. *Ibid.*, p. 689 *et seq.*

[4] Turner was supported by Higgins and Isaacs. *Ibid.*, pp. 692, 693 *et seq.* Reid, however, desired to limit the size of the house.

[5] He quoted Sheppard, *Constitutional Text Book*, and Wilson, *The State.*

[6] *Adel, 1897 Debs.*, p. 699 *et seq.* Barton agreed. *Ibid.*, p. 703 *et seq.*, especially p. 704.

[7] Turner failed to carry an amendment allowing parliament to change it. *Ibid.*, p. 709 *et seq.*

at the Sydney session by the recommendations of the Legislative Assemblies of Victoria and New South Wales that the provision be omitted.[1] Isaacs again urged the American provision, and summarized the changes made in the total number of American representatives to show that the House of Representatives had not become unduly large.[2] O'Connor, in reply, stressed the danger of allowing the house to become large while the other chamber remained small, and again referred to the executive powers of the American Senate.[3] The two to one ratio was again retained.[4]

Exactly the same ground was traversed at the Melbourne session, the same arguments being advanced on both sides. Isaacs again praised the American provisions, inquiring why, when the United States had been "slavishly followed" in other respects, it was being disregarded in this. He declared that the clause as it stood was unprecedented and preposterous, and doubted that Victoria would ever accept it.[5] Barton, in reply, pointed out that the adoption of responsible government for the Commonwealth would give the house of representatives very great power and prestige; the lack of responsible government in the United States, and the possession by the Senate there of large executive powers, made a fixed ratio between the two American houses unnecessary.[6] The ratio was again kept.[7]

[1] *Syd. 1897 Debs*, p. 420.

[2] *Ibid.*, p. 425 *et seq.* He quoted from Wilson, *The State*.

[3] *Adel. 1897 Debs.*, p. 429 *et seq.*

[4] By a vote of twenty-six to seventeen. *Ibid.*, p. 452. Turner and Isaacs urgently requested reconsideration. *Ibid.*, p. 466.

[5] *Melb. 1898 Debs.*, vol. ii, p. 1831 *et seq.*

[6] *Ibid.*, vol. ii, p. 1834 *et seq.* He also remarked that the provision was necessary to the operation of the deadlock provision which had been adopted to provide for the settlement of disagreements through a joint session if other means failed.

[7] *Ibid.*, vol. ii, p. 1837.

American precedents seem to have had rather more influence on some of the other provisions in regard to the house of representatives. The Australian Constitution, as finally adopted, provides that if a state excludes all persons of any race (other than aboriginals) from voting for members of the more numerous house of the state parliament, persons of that race shall not be counted in reckoning the population of the state.[1] The American Fourteenth Amendment requires a reduction in the representation of a state in the House of Representatives if the right of male citizens over twenty-one to vote is abridged.[2]

As in the United States, members of the house of representatives were to be elected by those qualified to vote for members of the more numerous house of the state legislature,[3] but in Australia the federal Parliament was empowered to modify the provision. At Adelaide Holder of South Australia made a plea for woman suffrage, which had already been adopted in his colony,[4] but Fraser assured the Convention that there was no disposition to extend woman suffrage in the United States, a statement which, in 1897, could have been disputed. Holder's proposal was defeated,[5] perhaps because of Mr. Wise's belief that woman suffrage in the United States would have hastened the Civil War and resulted in victory for the South [6]

[1] Const. Act, Secs. 25 and 127.

[2] The Australian exclusion of aboriginals in reckoning population (Sec. 127) parallels the American exclusion of Indians not taxed. Art. I, Sec. 2, Par. 3.

[3] Const. Act, Sec. 30; U. S. Const., Art. I, Sec. 2, Par. 1.

[4] *Adel. 1897 Debs.*, p. 715

[5] *Ibid*, p. 725. The vote was twenty-three to twelve. The Commonwealth Parliament enacted adult suffrage in 1902, Act No. 8. The states had all done so by that time.

[6] *Ibid.*, p. 718.

The qualifications for membership in the house of representatives were made somewhat more liberal in Australia than in the United States, though attention was directed to the American requirements by some of the more conservative Australians. It was finally required only that a member be able to vote in elections for members of the federal house of representatives, that he be twenty-one years of age, rather than twenty-five as in the United States, that he must have been three years a resident of the Commonwealth, and that he be either a natural-born subject of the Queen or a naturalized subject of five years' standing.[1] Fysh of Tasmania, citing American precedent, supported a proposed amendment requiring that each member of the house of representatives be a resident of the state from which he should be elected. Barton spoke against the proposal, and the Adelaide qualifications, which lacked such a requirement, were retained unchanged.[2]

In order to afford a means of relief, if any should be necessary, from the results of the sort of "gerrymandering" which had occurred in the United States, it was provided that "until the parliament otherwise provides" the electorates for the federal house of representatives should be established by the state parliaments.[3]

2. THE POWERS OF THE FEDERAL PARLIAMENT

At first the Australian leaders expected to delegate to the Commonwealth Parliament nearly the same powers which had been given to the American Congress, but from 1891 on a tendency to lengthen the list of such powers was apparent. In some instances there was a desire to profit from American experience either in clarifying provisions which in

[1] Const. Act, Sec. 34.

[2] *Syd. 1897 Debs.*, p. 458.

[3] *Ibid.*, p. 454 *et seq*

America had required much interpretation, or in including powers which experience and new conditions had shown to belong to parliament Some of the new clauses concerned finance, but most of them reflected the industrial and social changes which had taken place in the hundred years since the American Constitution had been written, and bore witness to a changing conception of the functions of government and of the relations of government to the people.

Parkes' resolutions at Sydney in 1891 reserved to the states all powers except those " agreed upon as necessary and incidental to the power and authority of the National Federal Government "; the only delegated powers which he specified were control of customs and defence.[1]

Deakin listed the powers of the American and Canadian federal governments to show how few they were and how little the authority of the states was impaired by them; he was not challenged, though he might well have been.[2] Sir George Grey, taking a different view, desired that the federal government be paramount, to prevent " a repetition of the disasters which took place in the United States " as a result of divided authority[3] Kingston of South Australia remarked almost immediately that there was a consensus of opinion in favor of the American rather than the Canadian way of delegating and reserving powers.[4] Cockburn warned the Convention that the powers of the states should not be closely defined because the functions of government were changing, and smaller units made good laboratories for social experimentation.[5]

[1] *Syd. 1891 Debs.*, p. 11; resolutions 1, 3 and 4. See Appendix II. Sir Henry's speech enlarged upon the resolutions very little.

[2] *Ibid.*, p. 39.

[3] *Ibid.*, p. 66 *et seq.* He did not mention the disasters which he had in mind

[4] *Ibid.*, p. 74.

[5] *Ibid.*, p. 97.

In the consideration of Parkes' resolutions in committee there was little mention of specific powers, though Dibbs read a draft which he had prepared and which gave to the federal Parliament control of military and naval defences, mints, coinage and currency, extradition, marriage and divorce, aliens and naturalization, the tariff, foreign relations, posts and telegraphs, weights and measures, patents and copyrights, quarantine, the census and statistics, banks and legal tender, commerce, shipping, navigation and lighthouses.[1]

In presenting the draft constitution to the Convention Griffith declared that the Committee on Constitutional Machinery had delegated to the Commonwealth no power which could be better exercised by the states, and none unnecessary to the good order and government of the Commonwealth.[2] This part of the Bill caused little trouble in the 1891 Convention, though some attention was given to the clause dealing with the regulation of commerce. The desire was expressed that the federal government be entrusted with sufficient power in such regulation to prevent discrimination, without granting such great powers as had been assumed by the American Congress.[3] Clark explained the Cullom Interstate Commerce Act of 1887 in some detail. Donaldson departed from American precedent and from the views of most of his colleagues in suggesting that the Commonwealth take over the public works of the states.[4]

Many of the powers which the 1891 Convention finally decided to give the proposed federal government coincided with powers delegated to the federal government of the United States and were also given to the Commonwealth

[1] *Syd. 1891 Debs.*, p. 165. He did not move his draft.

[2] *Ibid.*, p. 253. He read some of the powers, but made almost no comment.

[3] *Ibid.*, p. 320 *et seq* and p. 335 *et seq.*

[4] *Ibid*, p. 321.

by the Constitution Act of 1900. These included power to regulate trade and commerce with other countries and among the states;[1] to enact customs and excise laws uniform throughout the federation, but not on goods exported from state to state;[2] to enact other taxes uniform throughout the federation;[3] to borrow money on the public credit;[4] to control postal and telegraphic services;[5] to provide for the military and naval defense of the Commonwealth and the states, for the calling out of military forces to execute and maintain the laws of the Commonwealth or of any state or part of the Commonwealth, and for control of munitions of war;[6] to regulate currency, coinage, and legal tender;[7]

[1] 1891 Bill, Chap. I, Cl. 52, (1); Const. Act, Sec. 51, (i) and Sec. 99; U. S. Const., Art. I, Sec. 8, Pars. 3 and 5. The United States Constitution adds "and with the Indian tribes".

[2] 1891 Bill, Chap. I, Cl 52, (2); Const. Act, Secs., 88 and 99; U. S. Const., Art. I, Sec. 8, Par. 1. In the Constitution Act all kinds of taxes are covered in the word "taxation", but see also Sections 88, 89 and 90. In the American Constitution the prohibition of export taxes is in Art. I, Sec. 9, Par. 7, and is general.

[3] 1891 Bill, Chap. I, Cl. 52, (3); Const. Act, Sec. 51, (ii); U. S. Const., Art. I, Sec. 8, Par. 1; Sec. 9, Par. 4 forbids direct taxation by Congress save in proportion to population, a provision subsequently modified by the Sixteenth Amendment, in 1913.

[4] 1891 Bill, Chap. I, Cl. 52, (4); Const. Act, Sec. 51, (iv); U. S. Const., Art. I, Sec. 8, Par. 2.

[5] 1891 Bill, Chap. I, Cl. 52, (5); Const. Act, Sec. 51, (v); U. S. Const., Art. I, Sec. 8, Par. 7. In Australia telephonic services were added in 1897. The United States Constitution mentions only post offices and post roads.

[6] 1891 Bill, Chap. I, Cl. 52, (6) and (7); Const., Act, Sec. 51, (vi); U. S. Const., Art. I, Sec. 8, Pars. 12, 13, 14, 15 and 16. The Australian and American provisions differ here in details; the American clauses are more specific.

[7] 1891 Bill, Chap. I, Cl. 52, (13) (and (14), which mentions paper money); Const. Act, Sec. 51, (xii), (xiii); U. S. Const, Art. I, Sec. 8, Pars. 5 and 6. The American provision mentions coinage and "securities".

to regulate weights and measures;[1] to legislate on bankruptcy and insolvency,[2] on copyrights and patents,[3] and on naturalization;[4] and to govern the federal capital.[5]

The 1891 Bill almost quoted the American "elastic clause" in giving Parliament power to legislate in any "matters necessary or incidental for carrying into execution the foregoing powers and any other powers vested by this Constitution in the Parliament or Executive Government of the Commonwealth or in any department or officer thereof".[6] At Adelaide, the Committee on Constitutional Machinery retained this same wording, but at the Melbourne session it was considerably modified, though without debate.[7] In the Constitution Act this sub-section gives Parliament power to legislate on "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth".[8]

In both the 1891 Draft Bill and the Constitution Act, Parliament was given several powers not specifically granted

[1] 1891 Bill, Chap. I, Cl. 52, (15); Const. Act, Sec. 51, (xv); U. S. Const., Art. I, Sec. 8, Par. 5.

[2] 1891 Bill, Chap. I, Cl 52, (17); Const. Act, Sec. 51, (xvii); U. S. Const., Art. I, Sec. 8, Par. 4.

[3] 1891 Bill, Chap. I, Cl. 52, (18) ("trademarks" are also included); Const. Act, Sec. 51, (xviii); U. S. Const., Art. I, Sec. 8, Par. 8.

[4] 1891 Bill, Chap. I, Cl. 52, (19) ("aliens" is added); Const. Act, Sec. 51, (xix); U. S. Const., Art. I, Sec. 8, Par. 4.

[5] 1891 Bill, Chap. I; Cl. 53, (2); Const. Act, Cls. 52 and 125; U. S. Const., Art. I, Sec. 8, Par. 17.

[6] 1891 Bill, Chap. I, Cl. 52, (32); U. S. Const., Art. I, Sec 8, Par. 18.

[7] *Melb. 1898 Debs.*, vol. i, p. 227. A slight change was made after the adoption of the Constitution Bill by the Convention See also *Syd. 1897 Debs.*, p. 1090 *et seq.* (Isaacs).

[8] Sec. 51 (xxxix).

to Congress but exercised by it as implied powers. These included control of navigation and shipping,[1] of ocean beacons and buoys, lighthouses and lightships,[2] of quarantine,[3] of fisheries in Australian waters beyond territorial limits,[4] of the census and statistics,[5] of banking, the incorporation of banks, and the issue of paper currency,[6] of immigration,[7] and of the influx of criminals.[8]

Both the 1891 Bill and the Constitution Act conferred upon the federal parliament a number of powers which the American Congress does not possess,[9] notably the power to legislate on bounties, bill of exchange and promissory notes, the status within the Commonwealth of foreign corporations and of trading and financial corporations formed in any part of the federation, and on marriage and divorce. In Australia the parliament was also allowed to legislate on the service and execution throughout the commonwealth of the civil and criminal process and judgment of the state courts,[10] and, in

[1] 1891 Bill, Chap. I, Cl. 52, (8); Const. Act, Sec. 98 (transferred to the chapter on Finance and Trade).

[2] 1891 Bill, Chap. I, Cl. 52, (9); Const Act, Sec. 51 (vii).

[3] 1891 Bill, Chap. I, Cl. 52, (10); Const. Act, Sec 51 (ix).

[4] 1891 Bill, Chap. I, Cl. 52, (11); Const. Act, Sec. 51, (x).

[5] 1891 Bill, Chap I, Cl. 52, (12); Const Act, Sec. 51, (xi). Art. I, Sec 2, Par 3 of the American Constitution requires that a census be taken, as directed by Congress.

[6] 1891 Bill, Chap. I, Cl. 52, (14), Const Act, Sec. 51, (xiii). The clause as finally adopted reads: "Banking other than State banking; also State banking extending beyond the limits of the State concerned".

[7] 1891 Bill, Chap. I, Cl. 52, (24); Const Act, Sec. 51, (xxvii). Emigration is also mentioned in the Australian clause.

[8] 1891 Bill, Chap. I, Cl. 52, (25); Const. Act, Sec. 51, (xxviii)

[9] 1891 Bill, Chap I, Cl 52, (2), (16), (20) and (21); Const. Act, Sec. 51, (iii), (xvi), (xx), (xxi) and (xxii) Parental rights and guardianship were added in 1897-98.

[10] 1891 Bill, Chap. I, Cl. 52, (22); Const Act, Sec. 51, (xxiv).

this case as in the United States, on the recognition throughout the Commonwealth of the laws, public acts and records, and the judicial proceedings of the states;[1] on matters referred to the Parliament by state parliaments, but only so as to affect such states,[2] and on the people of any race, other than aboriginals, for whom special laws might be deemed necessary.[3] Power to legislate in external affairs and on the relations of the Commonwealth with the islands of the Pacific was also delegated to the Commonwealth Parliament.[4] In the American Constitution such authority is given to the federal government but is not listed among the powers of Congress.[5] The increased importance of financial and commercial provisions is evidenced by devotion of a separate chapter to them in the Australian bills.[6]

The Convention of 1897-98 lengthened the list of the powers of Parliament by authorizing legislation on astronomical and meteorological observations,[7] insurance, other than

[1] 1891 Bill, Chap I, Cl 52, (23); Const. Act, Sec. 51, (xxv). On this provision see the United States Constitution, Art. IV, Sec. 1.

[2] 1891 Bill, Chap. I, Cl. 52, (30); Const. Act, Sec. 51, (xxxvii). The following sub-clauses in both drafts confer legislative powers, with the concurrence of the state parliaments, with respect to the affairs of the territory of the Commonwealth which before the establishment of the Commonwealth could be exercised only by the Federal Council or the Parliament of the United Kingdom.

[3] 1891 Bill, Chap. I, Cl. 53, (1) (in the list of exclusive powers), Const. Act, Sec. 51, (xxvi). This suggests the difficulties in the United States in the control of Orientals.

[4] 1891 Bill, Chap. I, Cl. 52, (26) and (27); Const. Act, Sec. 51, (xxix) and (xxx).

[5] Art. II, Sec. 2, Par. 2, giving authority to make treaties to the President by and with the advice and consent of the Senate and provided that two-thirds of the senators concur. If appropriations are involved the House of Representatives also, in practice, has some voice.

[6] *Infra*, p. 180 *et seq.*

[7] Const. Act, Sec. 51, (viii).

insurance confined to the territories of one state,[1] and invalid and old age pensions,[2] and on conciliation and arbitration for the prevention or the settlement of industrial disputes extending beyond the limits of any one state.[3] In none of these provisions was any direct American influence apparent.

As in the American Constitution, provision was made in the 1891 Bill and in the Constitution Act for the exclusive power of the federal legislature to govern the federal capital and other properties acquired for public use.[4] The 1891 Bill and the Constitution Act both were more definite than the American Constitution in specifying that Parliament should also have exclusive powers to legislate in regard to any department or departments of the public service the control of which was to pass to the Commonwealth.[5]

At Sydney in 1891 these clauses were accepted quickly and almost without challenge; American precedent was scarcely mentioned.[6] In the 1897-98 Convention the discussion of some of the sub-clauses was much fuller, more changes were made in committee of the whole, and the citations of American precedent were more numerous, illustrating well the increase in knowledge of American constitutional law since 1891.[7]

A demand that the postal service be left to the states lest American log-rolling and corruption be introduced,[8] brought

[1] Const. Act, Sec. 51, (xiv).

[2] *Ibid.*, (xxiii).

[3] *Ibid*, (xxxv) Two new clauses in regard to railroads were also included here. *Infra*, p 183.

[4] 1891 Bill, Chap. I, Cl. 53, (2), Const. Act, Sec. 52, (ii); U. S. Const., Art. I, Sec. 8, Par. 17.

[5] 1891 Bill, Chap I, Cl. 53, (3); Const. Act, Sec. 52 (iii).

[6] *Syd. 1891 Debs*, pp. 320-342.

[7] For Barton's comments on these clauses when he introduced the original Adelaide Draft see *Adel. 1897 Debs*, p. 439 *et seq.*

[8] *Ibid.*, p. 768 *et seq.* (Carruthers).

from Deakin warm praise of the American federal administration of the post office, Americans, he declared, only regretted that the telegraphic service was in private hands.[1] Cockburn pointed to the power given to American political parties through the postal system, asserting that the "parties in America could not carry out their campaigns without the advantage which the control of post offices places in their hands"; like Carruthers, he believed that such patronage and such temptations should be kept away from the Commonwealth.[2] No change was made in the draft except that "telephonic and other like services" were also put under the control of the Commonwealth—presumably increasing the dangers of American corruption.[3] Other citations of American precedent were on minor points and tended to be technical.[4]

3. BUSINESS AND FINANCIAL PROVISIONS

The provisions of the American Constitution in regard to finance and trade are few and, as compared with the Australian treatment, general. Among the powers granted to Congress[5] are those of laying and collecting taxes, to pay the debts of the United States and to provide for the common defence, subject to the stipulation that all duties.

[1] *Syd. 1891 Debs.*, p. 770

[2] *Ibid.*, p. 772. Civil service reform was not mentioned.

[3] *Ibid*, p. 773.

[4] They included arguments on export taxes (*Adel. 1897 Debs.*, p. 761 *et seq*); the exclusion of opium and alcohol by the states, on which many American court decisions were cited (*ibid*, p. 830 *et seq.*, and *Syd. 1897 Debs.*, pp 1037-1059); the power of the states to prevent the introduction of plant and animal diseases, where again the citations were very detailed (*Syd. 1897 Debs.*, p. 1059 *et seq*); and Parliament's control over the federal capital and other federal property (*Melb. 1898 Debs.*, vol. i, p. 256 *et seq.*)

[5] Art. I, Sec. 8.

imposts and excises must be uniform throughout the country; to borrow; to regulate commerce with foreign nations, among the states, and with the Indian tribes; to establish uniform laws of bankruptcy; to coin money and to regulate its value; and to fix the standard of weights and measures. As has been seen,[1] these provisions are closely paralleled in the Australian Constitution Act. In the United States, Congress was forbidden [2] to lay any capitation or other direct tax except in proportion to population, to lay any duty on articles exported from any state, to give preference to the ports of one state over those of another, or to impose any duties on vessels engaged in interstate commerce. Here the Commonwealth Constitution followed the American only in forbidding the federal government to give preference in trade, commerce or revenue to any part of the Commonwealth over any other part.[3]

In America the states were forbidden, unless permitted by Congress, to lay any impost or duty on imports or exports, except for executing inspection laws, a provision which was included in the Australian Constitution.[4]

The industrial and commercial development of a century necessitated a more detailed and definite treatment of finance and trade; the American Constitution had been liberally interpreted and had been stretched to meet conditions which its framers could not foresee. The Australians consulted American experience, but they had to go far beyond the Constitution itself In the 1891 Bill a separate chapter was devoted to trade and finance.[5] In general, Australian clauses still followed American precedents, but not precedents set

[1] *Supra*, p. 175 *et seq.*

[2] Art. I Sec. 9

[3] Sec. 99

[4] Sec. 112; U. S. Const., Art. I, Sec. 10, Par. 2; *infra*, p. 202 *et seq.*

[5] Chapter IV.

by the framers of the Constitution. The federal control of customs was more definitely regulated;[1] provision was made for the taking into the federal civil service of state officials and of state buildings and equipment;[2] detailed provision was made for the distribution among the states of the federal surplus;[3] and specific provision was made for the assumption by the Commonwealth of the public debts of the states.[4] On none of these points does the American Constitution make any provision, though it had been interpreted to cover all of them.[5] Freedom of trade among the states was carefully guarded, as in the United States.[6]

In these matters the Adelaide Draft Bill followed the 1891 Bill closely, as Barton pointed out in presenting the report of the Committee on Constitutional Machinery,[7] and except for the clause relating to the assumption of the state debts, its provisions were accepted with little discussion. But as Barton also pointed out in presenting this report, the provisions in regard to the distribution of the surplus, railway and river control, and some parts of the clauses on assumption of debts, had been greatly altered. All of these points caused much difficulty—far more than in 1891—and the distribution of the surplus and the control of railways and rivers in particular were threshed out at great length.

In the question of the assumption and consolidation of

[1] 1891 Bill, Chap. IV, Cls. 4, 7.

[2] *Ibid.*, Chap. IV, Cls. 5, 6.

[3] *Ibid.*, Chap. IV, Cl. 9.

[4] *Ibid.*, Chap. IV, Cl. 13.

[5] In Australia bounties were mentioned as well as duties *Ibid.*, Cl. 4; Chap. I, Cl. 52, (2).

[6] Chap. IV, Cls. 8, 11. Some clauses are practically identical with those of the American Constitution, notably Art. IV, Cls. 3, 11 and 12 (on expenditures by appropriation only, and on preference to ports.

[7] *Adel. 1897 Debs.*, p. 433.

the state debts American precedent was little mentioned,[1] and the same was true in the long debates on the distribution of the surplus,[2] In the extremely troublesome and technical questions arising in connection with the control of interstate commerce, railways, river traffic, conservation and irrigation, American precedents—legislation and judicial decisions—were considered with great care, and clearly affected the decisions reached.[3] The questions were so involved that they had to be left to the lawyers for settlement, and the latter went thoroughly into precedents.

In the end the federal Parliament was empowered to grant bounties uniform throughout the Commonwealth;[4] to acquire, with the consent of a state, and on terms mutually agreed to, any railway of a state; and[5] to construct or extend railways in any state with the consent of that state.[6] The power of the federal Parliament to legislate on trade and commerce was declared to extend to navigation and shipping, and to railways owned by a state,[7] but the right to the "reasonable use" of river water for conservation or irrigation was protected.[8] An Inter-State Commission was established by the

[1] *Adel. 1897 Debs.*, p. 1085 *et seq.* But see also *Syd. 1897 Debs.*, p. 54 *et seq* (Deakin).

[2] See, for example, McMillan's statement of the problem at Adelaide. *Adel. 1897 Debs.*, 878 *et seq.* also *Melb. 1898 Debs.*, vol. ii, p. 2375 *et seq.*

[3] See, for instance, *Adel. 1897 Debs.*, pp. 1104, 1108 *et seq.*, 1118 *et seq.*, 1132 *et seq.*; *Syd. 1897 Debs.*, pp. 119 *et seq*, 132 *et seq.*, 214 *et seq*; *Melb. 1898 Debs.*, vol. i, pp. 410 *et seq.*, 1014 *et seq.*, 1250 *et seq.* (at length and in great detail). American legislation and decisions of both state and federal courts were cited with great frequency, especially by Isaacs, Barton, and Glynn and considerably by Deakin, Symon and Higgins. There was some citation of the United States also in the matter of bounties. *Melb. 1898 Debs*, p 949 *et seq.*

[4] Const. Act, Sec. 51 (iii); also Secs 86, 90, 91.

[5] *Ibid.*, Sec. 51, (xxxiii).

[6] *Ibid.*, Sec. 51, (xxxiv).

[7] *Ibid.*, Sec. 98.

[8] *Ibid.*, Sec. 100.

Constitution to adjudicate and administer, as Parliament might deem necessary, both the provisions of the Constitution and the federal laws made in accordance with it in regard to commerce and trade,[1] and Parliament was authorized, under certain conditions, to forbid preference and discrimination by the states in their control of railways.[2] The federal Parliament was empowered to take over all or any part of the public debt of the states *as existing at the establishment of the Commonwealth*[3] No provision for such assumption was made in America, though the matter was one which received the early attention of the new government. Hamilton's assumption of the public debt in the United States may have had some influence, but Australian federalists spoke of the problems facing the treasurers rather than, here, of American precedents.

Thus in stating the powers of Parliament and in defining Parliament's authority in commerce and trade, the Australian Constitution may almost be said to have brought the American Constitution up to date, and to have put into constitutional clauses settlements which, in the absence of specific provisions in the American Constitution, had been worked out with some difficulty by Congress, the states, and the courts. A careful consideration of the problems, a careful study of precedents, and a careful weighing of Australian conditions, brought the Convention to solutions very like those reached in the United States

[1] Const. Act, Secs. 101, 103.

[2] *Ibid.*, Sec 102.

[3] *Ibid.*, Sec 105. The italicized words were amended out of the Constitution in 1909.

CHAPTER V

American Influence on the Australian Judiciary

From the time of the Melbourne Conference there was general agreement that the American system of federal courts should be the model for the Commonwealth judiciary, and at no time did the Conventions depart from the American outline. The actual writing of the American provisions into the Australian Constitution was primarily the work of Mr. (later Justice) Inglis Clark, of Tasmania, a delegate at Melbourne in 1890, and chairman of the Judiciary Committee at Sydney in 1891; the 1897-98 Convention departed little from the 1891 provisions. Deakin took the lead, however, in expounding the American system at Melbourne, and Mr. (later Sir Josiah) Symon, chairman of the Judiciary Committee at the Adelaide session, influenced the final draft somewhat. Symon was not, perhaps, quite as ardent an admirer of the American Constitution as was Clark, but he certainly had a very high regard for it and was quite content to follow it in organizing the courts of the Commonwealth.

In 1890, Deakin, depending heavily upon Bryce, looked forward to a judicial system which would avoid the necessity for appeals to the Privy Council and which would make the power of the new union felt throughout its extent, as was the case in the United States. He explained that the American federal judiciary was more than a court of appeal at Washington, and described the other federal courts, scattered through the states, which dealt with:

cases affecting ambassadors, other public ministers and consuls;

cases of maritime jurisdiction; controversies to which the United States shall be a party; and controversies between two or more States, between a State and Citizens of another State, between citizens of different States, . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects.

This system, Deakin believed, exactly fitted the needs of Australia.[1]

Clark remarked that Deakin had left little to be said about the judiciary, but suggested that the American system would help to train and educate judges. He strongly desired one innovation upon the American organization; the Australian supreme court should be empowered to hear appeals from the state supreme courts in all cases and not, as in the United States, only in cases involving constitutionality. Clark, like Deakin, desired that in all matters purely Australian the decisions of the supreme court should be final.[2]

The resolutions offered by Parkes to provide some basis for discussion at the Sydney Convention, and to furnish some instructions to the drafting committee, simply provided for a "Judiciary, consisting of a Federal Supreme Court, which shall constitute a High Court of Appeal for Australia, under the direct authority of the Sovereign, whose decisions, as such, shall be final".[3]

In the general debate which followed most of the remarks about the judiciary concerned the advisability of abolishing appeals to the Privy Council.[4]

[1] *Melb. 1890 Debs.*, p. 89 *et seq* Playford objected that there would be unnecessary expense involved, to which Deakin replied that many existing expenses would be absorbed in the new ones, and that existing courts might perhaps be federalized.

[2] *Ibid.*, p. 108.

[3] *Syd. 1891 Debs.*, p. 12. Sir Henry did not elaborate upon this in his speech.

[4] Munro, Lee-Steere, and Cuthbert wished to retain the appeal. *Ibid.*, pp. 26, 94, 105, 142. Barton, Downer, Kingston,, Jennings, and Clark

Both Barton and Downer desired the establishment of a strong judiciary.[1] Rutledge believed that the supreme court should be given original jurisdiction in some instances, as had been done in the United States.[2] Clark, as at Melbourne, desired a complete system of federal courts modelled on those of the United States—not on those of Canada—but with a modification, which he had previously recommended, to allow appeals from the state supreme courts to the federal high court.[3] During the consideration of the Parkes resolutions in committee of the whole, Clark read an amendment which provided for inferior federal courts in addition to the supreme court, and for the limitation of appeals to the Privy Council to cases in which Imperial matters alone were concerned. The Convention indicated a willingness to refer the whole question of the judiciary to a select committee, and Clark dropped his amendment.[4] Kingston recommended a supreme court of the American type to decide constitutional questions arising between the federal government and the states. Downer favored the retention of appeal to the Privy Council as a safeguard against the modification of the meaning of the Constitution by judges like Chief Justice Marshall.[5]

did not. *Ibid*, pp. 47, 50, 79, 61, 123. In committee Wrixon succeeded in having the provision denying appeal struck out. *Ibid.*, p. 229 *et seq.* Mr. Justice Richmond, of Tasmania, wrote a long letter to Parkes protesting against the discontinuation of appeals. Printed in full in *Syd. 1891 Debs.*, p. cxci *et seq.*, together with Clark's comments in reply.

[1] *Syd. 1891 Debs.*, p 46 *et seq.*, p. 50 Barton mentioned Canada as a model, Downer the United States

[2] *Ibid*, p. 73.

[3] *Ibid*, p. 122 *et seq.*

[4] *Ibid.*, pp. 229 *et seq.* and 241 *et seq.* The committee was composed of Dibbs of New South Wales, Wrixon of Victoria, Rutledge of Queensland, Kingston of South Australia, Clark of Tasmania, Atkinson of New Zealand, and Hackett of Western Australia.

[5] *Ibid.*, pp 79, 230.

Clark was elected chairman of the committee on the judiciary, and drafted its report, which "in substance, though not in form", was then incorporated into the report of the Committee on Constitutional Machinery, to which Clark's committee reported. Except for the omission of provisions for trials of cases in which foreign countries, or their citizens or subjects, were involved, the omission of provision for treason trials, and the addition of paragraphs concerning the removal of judges, appeals from the state courts, appeals to the Privy Council, and the qualifications of lawyers practicing in the federal courts, the report drafted by Clark consisted of quotations from the American Constitution.[1] The Draft Bill, as presented to the Convention by Griffith, did not establish a supreme court but left its establishment to the discretion of Parliament; otherwise the Bill followed the American Constitution almost as closely as had Clark, though some changes in phraseology were introduced.[2] The chapter on the judiciary was accepted as it was reported by the Committee on Constitutional Machinery, though Wrixon objected to the allowance of appeals to the supreme court in criminal cases and to the unlimited power of the federal Parliament to confer original jurisdiction on the supreme court; Kingston moved for the insertion of provision for the creation of courts of conciliation and arbitration to settle industrial disputes.[3]

[1] The report is reprinted in Appendix III. The report and the 1891 Bill include a paraphrase of the American Eleventh Amendment, which prohibits suits against states by citizens of other states or by citizens or subjects of foreign states. In Australia the provision was extended to include suits against the Commonwealth, and Parliament was given power to modify the prohibition.

[2] On the other hand, Clark had changed "supreme court" to "high court" and the Committee on Constitutional Machinery had gone back to the American expression. Griffith in the speech made when he presented the draft passed rapidly over the chapter on the judicature. *Syd. 1891 Debs.*, p. 255.

[3] *Ibid.*, pp. 259, 261 and 377 *et seq.* Kingston's motion was defeated.

The Bill empowered Parliament to make the decisions of the supreme court final in all save a very few cases, an arrangement which Wrixon disapproved.[1] Parliament was authorized to invest state courts with federal jurisdiction, contrary to American precedent.[2]

At Adelaide, in 1897, the only reference to the judiciary which was contained in Barton's resolutions called for a " Supreme Federal Court, which shall also be the High Court of Appeal for each colony in the Federation ". In moving the resolutions Barton stressed the need for an impartial tribunal, capable of settling disputes in which the states or the Commonwealth were involved, and thus removing any possibility of recourse to arms; he believed that as a court of appeal the supreme court, though useful, would be relatively unimportant.[3]

In the introductory debate on Barton's resolutions it was generally assumed that there would be a judicial system apparently along the lines laid down at Sydney in 1891.[4] The fullest treatment of the judiciary was that by Symon, who praised the American judicial system very highly, referring to it as " the most noble as well as the most distinctive feature of the Constitution of the United States ". Although he observed that the American courts had been the object of some criticism and had been threatened with some limitation of their power, Symon believed their position secure, and

[1] *Syd. 1891 Debs*, p. 261 *et seq.*

[2] The definitions of the appellate and the original jurisdiction of the Commonwealth Supreme Court did not coincide exactly with those of the American Constitution.

[3] *Adel. 1897 Debs.*, pp. 17, 24 *et seq.*

[4] Quick believed that there was general acceptance of a judiciary to interpret federal law and to settle conflicts between state and federal laws. *Ibid.*, p. 185. For much the same attitude see also the remarks of Turner, Glynn, Carruthers, and Reid *Ibid*, pp. 44, 70 *et seq.*, 92 and 272 *et seq.*

accepted them as the best model for Australia.[1] The question of allowing appeals to the Privy Council engaged the attention of many speakers, most of whom, at this stage, favored the allowance of such appeal.

Sir Edward Braddon was alarmed at the cost of the prospective judicial system and suggested that, for the purpose of economy, the supreme court might be composed of the state chief justices.[2] The suggestion received some support[3] but was vigorously opposed by Wise and Barton, who pointed out that the arrangement would strike at the independence of the federal government, that it might send a case on appeal to a court which included a judge who had already rendered an opinion upon it, and that it would not permit the federal government to prevent from sitting in the supreme court a chief justice who might not have measured up to the requirements of his high office.[4]

Reid strongly recommended that the American Constitution rather than the 1891 Bill be followed in establishing a supreme court "embedded in the Constitution itself".[5]

As at Sydney in 1891, a sub-committee, of which Symon was made chairman, was appointed to consider the judiciary, and to report to the Committee on Constitutional Machinery.[6]

[1] *Adel. 1897 Debs.*, p. 129. [2] *Ibid*, p. 68.

[3] Particularly from Glynn and Fraser. *Ibid.*, pp 70 *et seq.* and 83

[4] *Ibid.*, pp 115 *et seq*, 368 *et seq* Symon and M T. Clarke agreed. *Ibid.*, pp. 129 *et seq*, 307.

[5] *Ibid*, p. 272. Barton, Wise and Deakin concurred, as did M. T. Clarke later in the debate. *Ibid.*, p. 307.

[6] As in 1891 the Committee on Constitutional Machinery reported the entire constitution to the Convention. The sub-committee was composed of Walker and Wise of New South Wales, Glynn and Symon of South Australia, M. T. Clarke and Dobson of Tasmania, Higgins and Peacock of Victoria, and James and Leake of Western Australia, together with all the premiers, ex officio. Neither the minutes nor the proceedings of the committees were published, though daily statements were given to the newspapers. For the Judiciary Committee see the *Sydney Morning Herald* of April 1, 2 and 5.

As Barton explained in presenting the new Draft Bill, the chapter on the judicature, although it had been redrafted, closely resembled the corresponding chapter in the 1891 Bill.[1] Now, however, instead of leaving the establishment of the supreme court to the Parliament the court was written into the Constitution, a change to the American provision and to Clark's recommendation in 1891. Parliament was empowered to establish additional federal courts [2] or to invest existing state courts with federal jurisdiction. The Draft Bill kept the 1891 provision for at least four associate justices in the supreme court, a requirement lacking in the American Constitution and not recommended by Clark. Appointments and removals of federal judges continued to be by the Governor General, by and with the consent of the Executive Council; it was still required that removals be made only upon an address of both houses of Parliament, in accordance, that is, with British procedure, together with, as in 1891, the American provision for continuance in office during good behaviour.[3] As in the 1891 Bill and the American Constitution, salaries were to be fixed by Parliament and were not to be diminished during the judge's term of office. The jurisdiction of the federal courts was defined as in the American Constitution except for the omission of cases involving land grants and those involving foreign nations, citizens or subjects, and for the addition of cases "in which a writ of mandamus or prohibition is sought against an officer of the

[1] *Adel. 1897 Debs.*, pp. 445 *et seq.*

[2] As in the United States. The American Judiciary Act of 1789 established such courts, regulated appeals to the Supreme Court (which was also established, in accordance with the requirement of the Constitution), and regulated procedure.

[3] Clark had put this provision in his draft. A requirement that the petitions of the houses of Parliament must both be made in the same session was added in 1897. This clause was much modified.

Commonwealth" and cases "relating to the same subject matter claimed under the laws of different States".[1] The allowance of appeals from the state courts to the federal supreme court in all cases, which was adopted in 1891 but which is not found in the American Constitution, was retained. The clauses concerning appeals to the Privy Council were considerably modified.[2] A provision, also not found in the United States Constitution, empowering Parliament to define the jurisdiction, within the limits of the judicial powers of the Commonwealth, of federal courts other than the supreme court, and to determine whether such jurisdiction should be exclusive or concurrent with that of the states, was retained and, as previously noted, Parliament was authorized to confer federal jurisdiction upon state courts

The original jurisdiction of the supreme court was defined as in the American Constitution and the 1891 Bill except for the inclusion of cases arising under a treaty. The provision adopted in 1891, but not found in the American Constitution, for the exercise of jurisdiction by such number of judges as Parliament might determine, was retained The requirement for the trial of indictable offences by jury and in the state where the offence was committed was the same as in the 1891 Bill and the American Constitution.[3] The paraphrase of the Eleventh Amendment to the American Constitution, which prohibits certain suits against states, appeared, as it had six years earlier.[4] As in 1891, treason was not mentioned, contrary to American precedent.

[1] The resemblance to the American Constitution was closer than it had been in the corresponding clause of the 1891 Bill.

[2] *Supra*, p. 97 *et seq.*

[3] The United States Constitution reads "crimes" instead of "indictable offences", and excepts impeachment cases.

[4] It was dropped later. A prohibition against the appointment of any judicial officer to an executive or administrative office was added later, and subsequently dropped.

It appears, then, that the judicial system which was recommended parallelled very closely that of the United States, and even the phraseology was much the same. The Australian treatment was more detailed in some respects; partly because of the imperial connection, partly for the sake of increased definiteness and, in one case at least, partly because of a desire to improve upon the American system, more clauses were included than in the American Constitution.

The essential features of the judiciary were accepted at Adelaide without debate, but a few details were challenged in committee. A proposal to omit the requirement of at least four associate justices of the supreme court, on the ground of the expense involved and the probable lack of many cases, caused a warm debate in which the need for a dignified court, able to command respect and to guard state rights, capable of attracting justices of the first rank, and comparable, in general, with its American counterpart, was stressed [1] In the end only two associate justices were required.

Glynn suggested the substitution of removal by impeachment only for removal on address of Parliament; he wished to ensure the greatest possible permanence to the courts and to have them removed as far as possible from party politics. He cited the views of the *Federalist* on the point, and quoted Wilson's *Congressional Government* to show how parties had attempted to control the American courts.[2] Wise objected that impeachment was unfamiliar to Australians and that the Bill had no provision for such procedure; moreover, removal on address had always been satisfactory.[3] Isaacs objected to any change which might give rise to litigation

[1] By Wise, Symon, Trenwith and Downer. Carruthers, Higgins, Kingston and Zeal spoke for the amendment. *Adel. 1897 Debs.*, p. 934 *et seq.* Some opposition to removal on address of Parliament was expressed.

[2] *Ibid*, p. 944 *et seq.*

[3] *Ibid*, p. 945 *et seq.*

between a judge and Parliament; he favored life tenure.[1] Symon and Barton supported an amendment proposed by Kingston providing for removal of judges only " for misconduct, unfitness, or incapacity ", upon an address from both houses of Parliament; they reminded the Convention that in a federal state the judiciary would occupy a position of more than usual responsibility, and quoted the *Federalist* and the Canadian and American Constitutions in support of their view.[2] Downer joined Glynn in strongly recommending the American plan of impeachment,[3] but the defenders of British procedure prevailed; the section, as agreed to, stipulated that judges " shall not be removed except for misbehavior or incapacity, and then only by the Governor General in Council upon an address from both houses of the Parliament praying for such removal ".[4] An attempt to secure a prohibition upon increases in the salary of a judge on the ground that he should have nothing to hope for from Parliament was successfully opposed by Symon, who drew his arguments from Hamilton in the *Federalist*.[5]

Glynn moved to allow Parliament to consult federal judges and to require an opinion or judgment on any doubtful point of law without waiting for a test case. He cited as precedents the right of the British Government to ask the Judicial Committee of the Privy Council for advisory opinions, and the similar right of the executive in Canada and eight of the American states. Bryce was appealed to by both sides.[6]

[1] *Adel. 1897 Debs.*, p. 947 *et seq.*

[2] *Ibid.*, p. 950 *et seq.*

[3] In the United States federal judges are removed on impeachment by the House of Representatives and trial by the Senate, provided that two-thirds of the senators present vote for conviction.

[4] *Ibid.*, p. 961.

[5] No. 79. *Adel. 1897 Debs.*, p. 961 *et seq.*

[6] Glynn quoted *The American Commonwealth*, vol. i, p. 258 (1888 ed.),

Symon objected that the "great charm of the judiciary in the Supreme Court of the United States consists in the fact that they do not mix themselves up with questions of legislation or constitutional law or the question of executive control until their attention is directed to it in some suit". The motion was lost.

The question of allowing appeals to the Queen in Council, always a highly controversial subject, called forth a lengthy debate. Those who wished to preserve the right desired to maintain all existing imperial links and believed that better judges and better decisions would be found in England; those who favored making the decisions of the Australian supreme court final talked of "getting out of our swaddling clothes", and pointed to the excellence of American decisions and to the contributions made by American jurisprudence to the development of English law.[1] When the American courts were mentioned, Sir Joseph Abbott exclaimed: "The American courts in the States are not courts which I would like our colonies to follow. The bulk of the American State Courts are not courts which are held in respect in any place in the world, and they are held in less respect in their own State than outside". The decisions of the federal Supreme Court, he admitted, were esteemed.[2] The proposal that appeal be allowed only when granted by the Queen in Council in matters concerning the public interest of the Commonwealth, a state, or other parts of the Empire, was retained, though the controversy was still far from ended.[3]

The clause restricting suits against the Commonwealth or

for approval of the right to ask an opinion. Barton, Symon, and Higgins were opposed, and Symon quoted Bryce to offset Bryce. *Adel. 1897 Debs.*, p. 963 *et seq.*

[1] Downer, Reid, Symon and Higgins took this view. *Ibid., pp.* 974 *et seq.*, 976 *et seq.*, 981 *et seq*, 986 *et seq.*

[2] Sir Joseph cited no authority. *Ibid.*, p. 974.

[3] *Ibid.*, p. 989; *infra*, p. 97 *et seq.*

a state, suggested by the American Eleventh Amendment, was unceremoniously struck out.[1] No other changes were made, although Higgins objected to putting into the Constitution the requirement that trial of criminal cases must be by jury; conditions were changing, he warned, and such details should be left to Parliament.

The judiciary clauses were not reached at the Sydney session, but many clauses or details were reconsidered at Melbourne in 1898. Glynn proposed again that the supreme court consist, until Parliament might otherwise provide, of the chief justice sitting with the chief justices of the state supreme courts; he declared that in 1801 there had been only ten cases awaiting trial in the United States, and he believed that the complexity of business which had later developed in the United States would be avoided in Australia.[2] In reply it was again objected that the supreme court should be established in the Constitution, that the judges ought to be strictly federal rather than be dependent for their position, emoluments and tenure upon the states, and that the experience of the United States at a period preceding recent industrial and commercial changes was no sure basis for estimating the amount of work which the court would have to do.[3] Isaacs reminded the Convention that it had been possible to "pack" the American Supreme Court, and mentioned the income tax case. Glynn's amendment was lost.

It was then proposed to omit the requirement of at least four associate justices. The main argument was again economy. O'Connor objected that the possibility of failing, for

[1] *Adel. 1897 Debs*, p. 989 *et seq.*

[2] *Melb. 1898 Debs.*, vol. i, p. 265 *et seq.* Griffith had made a similar suggestion, and the South Australian Legislative Council had recommended that the matter be left to Parliament.

[3] These arguments were presented by Barton, Symon, Higgins, Isaacs, and Downer. *Ibid.*, pp. 268 *et seq*, 269 *et seq.*, 279 *et seq.*, 283 *et seq*, 274 *et seq.*, respectively.

political reasons, to fill vacancies would be increased.[1] After a long debate it was determined to require only two associate justices instead of four.[2] There was much reference to the United States and to Canada. McMillan remarked that three John Marshalls would certainly meet all needs, but he thought that the requirements of five justices was safer. Kingston desired that the maximum number of justices be fixed to prevent the sort of "stuffing" of the court which had occurred in America. Solomon again expressed the wish that the United States and Canadian Constitutions had been burned before the Convention met.[3]

The clause defining the jurisdiction of the federal courts received some attention; the provision for the trial of cases "arising under any treaty" was retained in case of future need;[4] the sub-section which included cases "in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth" was struck out,[5] but was later restored.[6] Barton believed that an express provision was necessary to put such cases within the jurisdiction of the federal courts; he cited *Marbury* v. *Madison,* and other American decisions were cited frequently through the debate.[7] The

[1] *Melb. 1898 Debs.*, p. 285 *et seq*

[2] *Ibid*, pp. 306, 308; *supra*, p 193.

[3] *Ibid*, pp. 292, 300 *et seq*, 303. Fraser, too, was tired of hearing about the United States. *Ibid*, p. 311.

[4] *Ibid.*, p. 320.

[5] *Ibid*, pp. 320 *et seq.* and 349. Barton thought that the words were taken from the American Constitution; Isaacs thought not, although he said the federal court exercised the jurisdiction. (He cited the Debs case.)

[6] *Ibid.*, vol. ii, p. 1894.

[7] *Ibid.*, vol. ii, pp. 1875 *et seq*, 1194. The sub-section covering cases "relating to the same subject matter claimed under the laws of different states" was retained. Barton remarked that the words are in the American Constitution, which is incorrect. *Ibid.*, vol. i, p 321 *et seq.*

sub-section giving jurisdiction in cases between states was expanded to include also cases "between residents of different states, or between a state and a resident of another state".[1] The question of regulating appeals from the state courts to the federal supreme court was brought up The discussion turned on possible attempts of Parliament to curb or control the supreme court, and constant references were made to the United States. No amendment was carried, and the supreme, or high, court retained the power given to it in 1891 to hear such appeals.[2] Holder moved to provide for a referendum on laws declared unconstitutional by the supreme court, urging that the recent decision by the American Supreme Court in the income tax case illustrated the need for such a provision.[3] There was much opposition and he abandoned the proposal.

A new attempt to strike out the requirement of trial by jury for indictable offences failed, as had an attempt at Adelaide.[4] After much discussion, the prohibition against the appointment of a judicial officer to an executive or administrative office was removed.[5]

[1] *Ibid*, vol. ii, p. 1885. There was no discussion. The new words are found in the American Constitution (except that the American "citizens" has been changed to "residents")

[2] Wilson, *Congressional Government*, and Burgess, *Political Science and Constitutional Law*, were cited. *Melb. 1898 Debs.*, vol. ii, p. 1885. Sir George Turner attempted unsuccessfully to strike out the provision for appeals from the Inter-State Commission to the supreme court (*ibid.*, p. 2276 *et seq.*); Holder succeeded, however, in securing the limitation of such appeals to "questions of law only" (*ibid.*, vol. ii, p. 2285 *et seq*). There was much citation of American precedent.

[3] *Ibid*, vol. ii, pp. 1717, 1723 *et seq.* There was no mention of any demands in the United States for similar checks on either state or federal courts.

[4] *Ibid*, vol. i, p. 350 *et seq.* An amendment which authorized Parliament to modify the requirement was also lost. Glynn and Higgins were responsible for these motions.

[5] *Ibid.*, vol. i, p. 355 *et seq.*, vol. ii, pp. 1895 *et seq.*, 2341 *et seq.*

Thus the organization of the federal courts and, for the most part, their jurisdiction, followed American precedent, though details were necessarily modified. Contrary to the American provisions, the Australian High Court could hear appeals from the state courts on any matter, the latter failing to gain such exclusive jurisdiction in matters of state concern as is possessed by similar courts in America.[1] Otherwise important differences—and they are few—are traceable to Australia's status as a part of the British Empire, a factor which slightly modified the jurisdiction of the federal courts and which accounts for complicated provisions in regard to appeals to the Privy Council.

[1] In the United States no appeal may be taken from the State Supreme Courts to the Federal Supreme Court unless the interpretation of the Federal Constitution can be shown to be involved.

CHAPTER VI

States and New States in Australia and the United States

Although the question of state rights made the provisions in regard to the senate, deadlocks, and the amending process highly controversial, the clauses which directly defined the position of the states in the Commonwealth caused very little dissension. The provisions of both the 1891 and 1898 Bills correspond closely to those of Article IV of the American Constitution, though the phrasing was modified, some additional details were included, and the American guarantee to the states of a republican form of government was, of course, omitted.

Sir Henry Parkes' first resolution at Sydney in 1891 stipulated that "the powers and privileges and territorial rights of the several existing Colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government ."[1] Munro, the Victorian Premier, recommended as a substitute a paraphrase of the Tenth Amendment to the American Constitution, which reserves to the states or to the people all powers which the Constitution does not delegate to the federal government or forbid to the states.[2] Barton desired that a further guarantee of the terri-

[1] *Syd. 1891 Debs*, p. 11.

[2] *Ibid.*, p. 25. Munro's substitute for the first resolution read: "The powers and authority necessary or incidental to the federal government shall be set forth in the constitution. The powers not delegated to the federal government by the constitution, nor prohibited by it to the federated colonies, are reserved to the colonies respectively or to the people."

torial integrity of the states be included.[1] Downer connected the resolution with the question of state rights and the senate: "the 'powers and privileges and territorial rights'" could not remain intact if the people's will was to be supreme, and if the colonies were to be coerced by numbers.[2] There was, however, general agreement with the substance of the resolution by those who participated in the general debate.

When Parkes' resolution was reached in committee Macrossan of Queesland objected that the guarantee of existing colonial rights would, as drawn, protect unduly such provisions of the constitution as those providing for an appointive upper house. Instead of guaranteeing existing territorial rights he desired, furthermore, to adopt the American arrangement which permitted changes to be made but required the consent of all states concerned.[3] Downer agreed with this proposal. Sir George Grey started a digression by taking the point of view that the new federal constitution should liberalize the colonial constitutions, providing for elective governors and abolishing nominee upper houses.[4] The final outcome of this phase of the discussion was an additional resolution that each state be allowed to make such amendments to its constitution as might be necessary for the purpose of federation.[5] This and Grey's proposals both suggest American practice. Barton agreed that the American clause guaranteeing existing territorial rights should be followed, and succeeded in securing its adoption as an added instruction to the Committee on Constitutional Machinery.[6]

The chapters of the 1891 Bill on the states and on new

[1] *Syd. 1891 Debs.*, p. 44.

[2] *Ibid.*, p. 49.

[3] *Ibid.*, p. 157 *et seq.* The American clause is in Art. IV, Sec. 3.

[4] *Ibid.*, pp. 158 *et seq.*, 160 *et seq.*

[5] *Ibid.*, p. 230 *et seq.*

[6] *Ibid.*, pp. 163, 167, 230 *et seq.*

states were adopted by the Convention substantially as drafted by the committee, and with very little debate. Griffith, in the speech with which he placed the draft before the delegates, stressed the powers left to the states. He listed.

> constitutions, the borrowing of money, the complete control of the government of the state, all the laws relating to property and civil rights, the whole subject of public lands and mines, the registration of titles, education, criminal law and its enforcement, hospitals and such matters, all local works and undertakings, municipa[l] institutions, imposition of licenses, the administration of justice, both civil and criminal, and the establishment of courts, and an absolute power to dispose of their revenue in any way they see fit.[1]

He also read the clause reserving to the state parliaments all powers not specifically forbidden to them and not exclusively delegated to the federal Parliament. Existing colonies not entering the federation at once were to be allowed to join later on the same terms as the original states, other states joining later would do so on terms fixed by the federal Parliament.[2]

The 1891 and 1897 Bills, as drafted and adopted, resembled the American Constitution in reserving to the states all legislative powers not exclusively delegated to the federal Parliament or withdrawn from the states, except that the American provision does not employ the word "exclusively";[3] in declaring that state laws inconsistent with federal laws must give way to the latter;[4] in permitting the states, after the imposition of a uniform tariff, to levy on imports or exports such

[1] *Syd. 1891 Debs.*, p. 254.

[2] *Ibid.*, p. 256 *et seq.*

[3] 1891 Bill, Chap. V, Cl. 1; (Const. Act, Sec. 107). U. S. Const., Tenth Amendment.

[4] 1891 Bill, Chap. V, Cl. 3; (Const. Act, Sec. 109). U. S. Const., Art. VI, Par. 2.

charges as may be necessary for executing the inspection laws of the state, with the added restriction, as in the United States, that the proceeds must go to the Commonwealth and that the inspection laws be subject to change by Parliament;[1] in prohibiting the states from maintaining military forces in time of peace without the consent of Parliament, and from taxing federal property;[2] in forbidding the state governments to coin money or make anything but gold and silver legal tender;[3] in forbidding the federal government to make any law prohibiting the free exercise of religion;[4] in guarding against discrimination by a state against persons from another state;[5] in requiring that full faith and credit be given throughout the Commonwealth to the laws, public acts and records, and judicial proceedings of every state;[6] and in obliging the Commonwealth to protect the states against invasion and, if requested by the executive of the state, against domestic violence.[7]

The 1891 Draft Bill was more specific than the American

[1] 1891 Bill, Chap. V, Cl 13; Const. Act, Sec 112; U. S. Const., Art. I, Sec 10, Par. 2.

[2] 1891 Bill, Chap. V, Cl 14; Const. Act, Sec 114; U. S. Const., Art I, Sec. 2, Par. 3 and decisions of the federal Supreme Court; in the United States the restrictions do not appear in the Constitution.

[3] 1891 Bill, Chap. V, Cl. 15; Const. Act, Sec 115; U. S. Const., Art. I, Sec 10, Par. 1.

[4] 1891 Bill, Chap. V, Cl. 116, Const Act, Sec. 116; U. S. Const., First Amendment. Sec. 116 of the Constitution Act and Article VI of the American Constitution both forbid the imposition of any religious test for office holding.

[5] 1891 Bill, Chap V, Cl. 17; Const. Act, Sec. 117; U. S. Const, Art IV, Sec 2, Par. 1.

[6] 1891 Bill, Chap. V, Cl. 18; Const Act, Sec. 118; U. S. Const., Art. IV, Sec. 2

[7] 1891 Bill, Chap IV, Cl. 19, Const. Act, Sec. 119; U S. Const., Art. IV, Sec. 4. The United States Constitution also requires the federal government to guarantee to each state a republican form of government.

Constitution in providing that the state constitutions were to remain in force until changed by the states, and that until the federal Parliament should exercise the powers delegated to it, state laws were to remain in force and could be modified by the states; in declaring that a state could surrender a part of its territory to the Commonwealth (this particularly concerned the Northern Territory of South Australia, which, it was expected, would be taken over by the Commonwealth); and in requiring every state to provide for the detention and punishment of offenders against federal laws.[1] The American provision for extradition of offenders against state laws, and the clauses forbidding states to enter into treaties, alliances or confederations, to issue letters of marque and reprisal, to pass acts of attainder, or ex post-facto laws, to impair the obligation of contracts, or to grant any title of nobility,[2] are not found in the 1891 Bill or the Constitution Act of 1900.

The Australian provisions of 1891, 1897, and of the Constitution Act in the chapter on the admission of new states are also much like the corresponding American provisions. The federal Parliament was empowered to admit new states;[3] to govern territories;[4] and to create new states from an old state, or from parts of old states, with the consent of the parliament of any state involved,[5] and to alter the boundaries of a state, with the consent of the parliament of that state.[6]

[1] 1891 Bill, Chap. IV, Cls. 6, 2, 12, 20 respectively. Const. Act, Secs. 106, 108, 111, 120, 110; Art. VI, Par. 2, of the American Constitution binds the states to enforce federal laws, but not so specifically.

[2] Art. IV, Sec. 2, Par. 2, and Art. I, Sec. 10, Par. 1.

[3] 1891 Bill, Chap. VI, Cl. 2, Const. Act, Sec. 121; U. S. Const., Art. IV, Sec. 3, Par. 1.

[4] 1891 Bill, Chap. VI, Cl. 3; Const. Act, Sec. 122; U. S. Const. Art. IV, Sec. 3, Par. 2.

[5] 1891 Bill, Chap. VI, Cl. 5; Const., Act, Sec 123; U. S. Const., Art IV, Sec. 3, Par. 1.

[6] 1891 Bill, Chap. VI, Cl. 4; Const. Act, Sec. 124.

The most striking difference, however, and the only one of any note, is found in the power of the Commonwealth Parliament to impose conditions for the admission of a new state even to the extent of varying the basis of representation of such a state in either house of Parliament.[1]

Although it is apparent that the 1897-98 Convention departed little from the provisions of the 1891 Draft Bill in these chapters, the work of the earlier Convention was nevertheless reconsidered. Barton's resolutions at Adelaide in 1897 offered the colonies the same guarantees which had been agreed to at Sydney in 1891. The chapters dealing with the states and with new states required but brief consideration in committee of the whole. Much of such discussion as took place concerned the state governors, dignitaries with whom the American Constitution is little concerned.

The consideration of the chapter dealing with new states resulted in the striking out of the special provision that if any of the existing colonies entered the federation after its establishment they should do so on the same terms as the original members. Barton explained that in the United States special conditions had sometimes been imposed and that the clause had been intended to protect existing colonies; the Convention decided that special consideration for colonies which might postpone entrance was not desirable.[2]

The clauses concerning the states were not reached at the Sydney session Some attention was given to them at Melbourne the following year, but few changes of any note were made. The clause which provided that a " state shall not

[1] 1891 Bill, Chap. VI, Cl. 2; Const. Act, Sec. 121

[2] *Adel 1897 Debs*, pp 1007 *et seq.* There was no reference here or later to the debate in the American Convention on imposing conditions on new states (Madison's *Notes* for August 29), nor to American attempts to establish such conditions. Braddon failed to secure representation of the territories on a population basis; Barton cited the American arrangement of territorial delegates in opposing the motion.

make or enforce any law abridging any privilege or immunity of citizens of other states of the Commonwealth, nor shall a state deny to any person within its jurisdiction the equal protection of the laws" caused much difficulty. Sir John Forrest reminded the Convention that Western Australia barred colored races, "even undesirable British subjects", from the colony; he believed that citizenship needed to be defined in the constitution.[1] Isaacs explained that the clause was taken from the Fourteenth Amendment to the American Constitution, of which he gave the history; he also recalled the cases which had unexpectedly arisen under that amendment.[2] Wise believed that the Australian clause had been included in 1891 not simply because it was in the American Constitution but to prevent a state from injuring through its legislation the citizens of property of another state.[3] The Tasmanian Assembly had proposed an amendment which was simply a paraphrase of a part of the American Fourteenth Amendment; the suggestion was frequently commended but

[1] *Melb. 1898 Debs*, vol. i, p. 665.

[2] Particularly the Slaughter House cases; he also mentioned the decision in *Yick Wo v. Hopkins*, in which the rights of a Chinaman had been upheld. *Ibid.*, vol. i, p. 667 *et seq.* This amendment was agreed to by Congress in 1866, at the close of the Civil War, and proclaimed in 1868. Its four sections: (1) made all persons born or naturalized in the United States citizens, and forbade the state to abridge their rights; (2) provided for the reduction of the representation in Congress of any state which should abridge the right of citizens (except criminals) to vote; (3) barred confederate leaders who had taken an oath to support the Constitution from office, unless Congress should remove the disability; (4) protected the federal public debt and forbade the payment of all confederate debts and of any indemnification for the loss of slaves. The first section was intended to guarantee the rights of negroes but actually was given a wider interpretation.

[3] He also cited American cases. He pointed out that special poll, probate or absentee taxes would be examples of the discrimination which the clause was intended to prevent.

did not seem to meet the situation.[1] O'Connor, objecting to the "slavish" following of the American Constitution, wished to omit the definition of citizenship which appears at the beginning of the Fourteenth Amendment—surely, he declared, anyone who could vote was a citizen—, but he desired to adopt the guarantee which followed the definition; he pointed out that the right to deal with alien races was given to the Commonwealth elsewhere.[2] Wise believed that the Tasmanian amendment—that is, the American Fourteenth Amendment—was needed, though perhaps the wording required modification.[3] Reid protested that the rights of the states were being interfered with increasingly and excessively.[4] Sir John Forrest, Isaacs and Reid desired that the clause be simply struck out,[5] which eventually was done.[6]

Symon raised the whole question again by moving the insertion of a clause requiring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states", the exact words of a paragraph in the American Constitution.[7]

[1] *Melb 1898 Debs*, vol. i, p. 667.

[2] *Ibid.*, vol. i, p. 671 *et seq.* Barton supported O'Connor's position

[3] *Ibid.*, p. 674 *et seq.*

[4] *Ibid.*, p. 675 *et seq.* He was disposed to accept the amendment, however, provided the guarantees were to protect citizens of the Commonwealth (meaning citizens of the states resident in the Commonwealth) and not, in addition, "all persons owing allegiance to the Queen" residing in the Commonwealth; that modification would avoid the question of alien races barred by the immigration laws.

[5] *Ibid.*, p. 691. There was further reference to American precedent and to decisions which endangered state restrictions on the Chinese and attempts to regulate factory conditions. Baker's *Annotated* [*Notes on* (*sic.*) *the*] *Constitution of the United States* was again cited. *Ibid.*, p. 686 *et seq.*

[6] *Ibid.*, p. 680 *et seq.*

[7] Art. IV, Sec. 2, Par. 1. This motion was made four weeks after the earlier clause was struck out. *Melb. 1898 Debs*, vol. ii, p. 1780 *et seq.*

He was promptly asked what a citizen was, what the status of colored races would be, and what the status of a corporation would be—all of which were points upon which American precedent had to be consulted.[1] Dr. Quick had drafted a definition of "citizen" which included persons resident in the Commonwealth who were natural-born or naturalized subjects of the Queen, if subject to no disabilities imposed by Parliament.[2] Barton wished to avoid the necessity for the definition by using the word "subject". The Convention was convinced that some provision was needed, and finally solved the various difficulties by agreeing that: "No subject of the Queen resident in any state shall be subject in any other state to any disability or discrimination not equally applicable to the subjects of the Queen in such other state", a solution which was kept.[3]

[1] Symon replied that a corporation would be a citizen, Isaacs reminded him that such was not the case in the United States, and that the words which Symon was proposing would not so provide. *Ibid.*, vol. ii, p. 1782 *et seq.* Isaacs also quoted Burgess (vol. i, pp 255-6) on this same clause in the German Constitution, where it had failed to attain its object; Symon admitted that perhaps the clause needed to be extended; Quick objected that state rights were affected by the proposed clause. *Ibid.*, vol. ii, p. 1785. Wise cited Cooley, *Constitutional Limitations*, to show the excellent effect of the provision in America, and used a memorandum of Inglis Clark in regard to a very pertinent case in which Maine was involved He proposed to change "citizens of each state" to "citizens of the Commonwealth", however, allowing Parliament to determine who were citizens and to control the citizenship of (colored) aliens.

He had attempted to get this definition into the constitution but had failed. *Ibid*, vol ii, pp. 1750-1768. See also p. 1786 (Barton).

Const. Act, Sec. 117. Dr. Quick, Barton, Braddon (with the American Fourteenth Amendment again), and O'Connor, had all tried to meet the difficulties; the final happy suggestion came from Turner. *Ibid.*, vol. ii, pp. 1800, 1802. A verbal change was made later. *Ibid.*, vol. ii, pp. 2397 *et seq.* There was a discussion of the clause dealing with inspection charges fixed by the states, in which some references were made to American cases. No changes resulted. *Ibid.*, vol. i, pp. 646-652. The restriction of state action in regard to religion received some attention here. *Ibid.*, vol. i, pp. 654 et seq., 664. The same points were raised in connection with the preamble.

The clauses dealing with new states were accepted as they were presented Dr. Cockburn objected to putting any disabilities upon new states, arguing that the experience of the United States was entirely against such a policy, but he failed to carry his point.

These two chapters, then, consist of the provisions of the American Constitution with such few modifications as were either necessitated by imperial connections or suggested by American experience; here, as in many other matters, American and Australian conditions and needs appeared to be very similar indeed.

CHAPTER VII

The Australian and American Provisions for Amendment

There were repeated demands in the Australian conventions that the Australian process of amending the constitution be made easier than that of the United States. The representatives of the smaller colonies feared, however, that state rights, which they had been at great pains to safeguard, might be endangered by an easy method of amendment, and the division of large against small colonies accordingly recurred, with much of the bitterness which had marked the debates in regard to the senate.

Provisions for amendment received very little attention at the Melbourne Conference of 1890 or at the Sydney Convention of 1891. The plan included in the 1891 Draft Bill was drawn up by the Committee on Constitutional Machinery, the sessions of which, as has been remarked, were secret. There was, however, a short debate in the Convention on the recommendations of the committee, and some modifications were made before the plan was adopted.

At Melbourne the previous year Deakin had expressed a preference for an easier method of amendment than that in force in the United States,[1] and Hall of New Zealand had also commended such a modification.[2] At Sydney in 1891 the

[1] *Melb. 1890 Debs*, p 253. The American process requires the initiation of an amendment either by a two-thirds vote of both houses of Congress or by a convention summoned by Congress on the application of two-thirds of the state legislatures, and ratification by three-fourths of the states acting, at the option of Congress, either through their legislatures or through special conventions. U. S. Const., Chap. V.

[2] *Ibid*, p. 254

first member to discuss the subject was Thynne of Queensland, who, speaking on the Parkes resolutions, favored the addition to them of a " provision which would establish the right of the people of the Colonies to pass not only the proposed Constitution, but to have all future amendments of it submitted to their direct vote for approval ", a thoroughly democratic system which, he believed, would guard the country against hasty and ill-considered changes in the constitution, and which would be in accord with the theory of the sovereignty of the people.[1]

In dissenting from some of the views of Sir George Grey, who had suggested, among other things, that the states should have the right to amend their own constitutions, as in the United States,[2] FitzGerald of Victoria took a conservative attitude towards amendments He condemned methods which might make changes easy of adoption, reminding the Convention that they must be made through the Imperial Parliament. He hoped that the structure of the Australian constitution would " have its foundations laid so solidly and so soundly " as not to require repair for many years to come.[3]

Bray, champion, as ever, of the small colonies, was less confident that the constitution could be made permanently, or even long, satisfactory in all respects, but he reminded the Convention that the small states would be apt to require guarantees against easy changes in important provisions.[4]

The question received little more attention until the Committee on Constitutional Machinery made its report.[5] In

[1] *Syd. 1891 Debs.*, p. 52

[2] *Ibid.*, p 68.

[3] *Ibid*, p 79.

[4] *Ibid.*, p. 125 *et seq*

[5] Moore had remarked incidentally—and incorrectly—that in the United States proposed amendments were first submitted to a popular convention. He was not corrected. *Ibid.*, p 137.

presenting the bill which the committee had drafted, Griffith remarked in regard to the provisions for amendment:

> With respect to amendments of the constitution, it is proposed that a law to amend the constitution must be passed by an absolute majority of both the senate and the house of representatives; that, if that is done, the proposed amendment must be submitted for the opinion of the people of the states to be expressed in conventions elected for the purpose, and that then if the amendment is approved by a majority of the conventions in the states it shall become law, subject of course to the Queen's power of disallowance. Otherwise the constitution might be amended, and by a few words the commonwealth turned into a republic, which is no part of the scheme proposed by this bill.[1]

The real debate on the question came at the end of the Convention, after the other provisions of the Draft Bill had been disposed of. A considerable amount of warmth was then displayed In bringing up the clauses for consideration, Griffith recommended that the "minimum number of representatives of any state in the house of representatives" be especially protected against change, as had already been provided in the case of the proportionate representation of any state in either house of Parliament. The recommendation was promptly adopted.[2]

Munro, of the large state of Victoria, then made the point that under the committee's plan the small states had two opportunities to veto proposed amendments, since in two of the three votes required the voting was to be by states—first in the senate and later in the state conventions. Gillies of Victoria refused to admit that the point was valid, insisting that the vote in the house of representatives as well as in

[1] *Syd. 1891 Debs.*, p. 257.

[2] *Ibid.*, pp. 428, 434. Article V of the American Constitution provides that no state shall be deprived of its equal suffrage in the senate without its consent.

the senate gave the nation as a whole full opportunity to express itself through its own chamber.[1] Kingston came to the rescue with the suggestion that what Munro desired was the reference of the amendment to the whole people in convention, to which Munro assented.[2] Baker of South Australia, who, when the rights of the small states were in question, was never disposed to pour oil on the waters, exclaimed: "Come into my parlour, said the spider to the fly".[3] Munro, supported by Deakin, proceeded to urge that proposed amendments should be referred to a national rather than to state conventions, to the people rather than to the states.[4] Donaldson suggested that the requirement of a two-thirds vote in the Parliament, in effect in the United States, might dispose of the difficulties.[5] Playford, though he was, like Baker, a representative of South Australia, favored requiring a majority of the people as well as of the states, and of all the people rather than merely majorities in a majority of the states. He agreed that the requirement would constitute a double safeguard for the large states.[6] Deakin endorsed this proposal, though he expressed some fear lest the amending process be rendered too difficult.[7] In a new passage between Munro, who wished the popular will to prevail, and Gillies, Sir George Grey came to the support, as usual, of the democratic view.[8]

The debate made an impression on Griffith; to meet Munro's objection he now moved to require approval by con-

[1] *Syd. 1891 Debs*, p. 428 *et seq.*

[2] *Ibid*, p 429.

[3] *Idem.*

[4] *Idem.*

[5] *Idem.* His explanation of the American process included the statement that in the United States the consent of only a majority of the states is required. He was not corrected.

[6] *Ibid.*, p. 429 *et seq.*

[7] *Ibid.*, p. 430.

[8] *Idem., et seq.*

ventions in a majority of the states, with the stipulation that the people of the states whose conventions should thus approve the proposed change should constitute a majority of the people of the Commonwealth.[1] Deakin suggested that the requirement should be a majority only of those voting rather than of the whole population.[2] He also objected to the wording, which Playford, with characteristic bluntness, termed "clumsy". The latter now proposed direct reference of amendments to the people, as in Switzerland, a proposal which promptly involved him in a vigorous disagreement with Gillies.

Cockburn, another South Australian, gave the debate a new twist in supporting Playford's condemnation of conventions as ratifying agencies, declaring: "They were proposed in America as a barrier against the popular will. Those who advocated and established conventions meant them to be a direct check on the popular will". Accordingly—for he was an advocate of pure democracy—he favored direct reference to the people.[3] Gillies differed, of course, and Griffith denied Cockburn's assertion that conventions were established in America to check the popular will The latter appealed to Bryce: "He says that the conventions were established as a check on the popular will, and democracy has ridden right over them." Cockburn then moved that the requirement of conventions be omitted,[4] a motion which brought forth a clear defense of the convention idea from Griffith in a statement worth quoting:

The amendment fairly raises the question of conventions as against a plebiscite. I certainly challenge the accuracy of the hon. member's statement as to the history of conventions. I do not

[1] *Syd 1891 Debs.*, p. 431.

[2] *Idem.*

[3] *Ibid.*, p. 432 *et seq*

[4] *Ibid*, p. 433 For the reference to Bryce see the *American Commonwealth*, vol. i, p. 26 *et seq.* (1895 ed.) for approximately this view.

believe the historical view is correct as to the object for which conventions were introduced; but certainly the purposes for which they have been used have been absolutely in the interests of democracy. It is an institution thoroughly used in America. No amendment of the Constitution is made without a convention [!]. The people of that country, who are a practical people, recognize that millions of people are not capable of discussing matters in detail; they deal with general principles, and select men whom they trust to deal with details. That is the principle of conventions. That is why I think they are far preferable to a plebiscite. . . . [1]

Deakin replied, though he remarked that the question had already been argued in committee, where the advocates of the referendum had been in a comparatively small minority. He pointed out that conventions are not in a position to deliberate, but, like the people, must content themselves with merely saying " yes " or " no ". Furthermore in America it had been possible to propose amendments " on such broad lines " and involving " such simple propositions " that they were readily within the grasp of all of the electors; what, then, was the advantage of an intermediate body? Nor could Deakin see anything in a referendum which might be detrimental to the dignity of Parliament.[2] Baker suggested a possible advantage in the convention system in that candidates and electoral campaigns would educate the people.[3]

In a thin vote the provision for conventions was retained.[4] Several small states representatives voted in favor of the referendum, apparently as a more democratic method. On the other hand Parkes, Munro, and McMillan of the large states group, supported the convention plan.

Griffith's requirement that the people of the states whose

[1] *Syd. 1891 Debs.*, p. 433.

[2] *Idem.*

[3] *Ibid.*, p. 434.

[4] *Idem.* The vote was nineteen to nine.

conventions approve the amendment should form a majority of the people of the Commonwealth was then agreed to,[1] and an unimportant change in phraseology ended the consideration of the amending process by this convention.

At Adelaide it was Turner of Victoria who first raised the question of the amending system He favored a "reasonable" procedure, fearing that otherwise the constitution might crack under too great a strain, the American method, which he correctly described, he considered to be too difficult. He recommended a simple majority of both houses to be followed by direct reference to the people.[2] He was supported by Carruthers, Higgins and Isaacs, all of whom agreed that the American procedure was too difficult.[3] Higgins remarked that in the United States there must be practically resort to civil war to secure an amendment, and Isaacs cited Professor Burgess and Chief Justice Marshall against the American system.[4] Trenwith, who, like the preceding speakers, was from the large colony of Victoria, was likewise convinced that American experience demonstrated the necessity for an easier method; he favored a popular referendum.[5] Opposed to the view that the amending process should be easy were O'Connor of New South Wales, who endorsed the provisions of the 1891 Bill, and Braddon and Henry of Tasmania.[6]

The new Draft Bill as presented at Adelaide differed from the 1891 Bill in that proposed amendments which passed the two houses of Parliament by an absolute majority were to be referred to the people rather than to conventions, in that they were to be so referred within from two to three months of their passage by Parliament, and in that, to be accepted, they

[1] *Idem.* [2] *Adel. 1897 Debs.*, p. 48 *et seq.*

[3] *Ibid.*, pp. 92, 96, 180 *et seq.*

[4] *Ibid*, p 180 *et seq.* [5] *Ibid.*, p. 335.

[6] *Ibid.*, pp. 57 *et seq.*, 69 *et seq.*, 119.

must be approved by the electors of a majority of the states, with the added requirement that the people of the states so approving must be a majority of the people of the Commonwealth [1] The electors were to be those qualified to vote for members of the federal house of representatives. No provision was included for action in case one of the houses of Parliament persisted in refusing to approve a proposed change.

When the clause came up for consideration Deakin moved to require a simple rather than an absolute majority in Parliament.[2] Braddon was opposed Isaacs, who was in favor of the change, again spoke of the excessive difficulty of the American procedure, referring once more to Burgess' views and declaring that in the United States three millions of people were able to block forty-eight millions [3] Cockburn of South Australia also appealed to American experience,[4] but the motion for easier requirements was lost.[5]

In a similar attempt to lessen the difficulties of amendment, Lewis moved to require only a majority of those voting on the proposals, rather than to require that the people of the states which accepted a proposal be a majority of the people of the Commonwealth.[6] The fact that South Australia has woman suffrage, and therefore a disproportionate number of electors, caused the failure of this motion, [7] in the course of the debate upon it a statement was made that no real amendment had been made to the Constitution of the United States in the first sixty years of its existence.

Two days later the clause dealing with the amending process was reconsidered and, without debate, though perhaps an understanding had been reached informally, was amended to

[1] Cl 121; *Adel. 1897 Debs*, p. 454 *et seq.*

[2] *Ibid.*, p. 1020.

[3] *Ibid.*, p 1021 *et seq.*

[4] *Ibid.*, p. 1022.

[5] *Ibid*, p. 1023.

[6] *Ibid.*, p. 1024.

[7] *Ibid.*, p. 1027.

require approval by " a majority of the states and a majority of the electors voting ".[1] The Adelaide session then left the subject.

In the interval between the Adelaide and Sydney sessions the colonies had an opportunity to consider the work of the former and to make suggestions. The clauses dealing with the amending process were not reached at Sydney, but at Melbourne it was proposed, in accordance with a New South Wales recommendation, to omit the word " absolute " in the requirement of a majority of both houses of Parliament McMillan of New South Wales, although he conceded that the American amending process was too difficult, nevertheless believed that the requirement of an absolute majority should be retained, which was done.[2]

Isaacs, always in favor of allowing the people to settle issues, sponsored an amendment providing that if one house of Parliament refused to agree to an amendment proposed by the other, the proposal should be referred to a dual referendum; he stressed the dissatisfaction in the United States with the rigidity of the Constitution, and desired that the people, rather than their representatives, probably chosen on issues quite irrelevant to the proposed amendment, decide the question.[3] Isaacs warned that attempts to secure reasonable amendments had been blocked repeatedly in America, and he feared that Australia might suffer from the same difficulty. Downer, however, declared that the attitude of Isaacs implied that the latter did not expect both houses of Parliament to represent the people.[4]

[1] *Adel. 1897 Debs.*, p. 1204 *et seq.*

[2] *Melb. 1898 Debs.*, vol. 1, p. 716.

[3] *Ibid.*, p. 716 *et seq.* Isaacs quoted Burgess, *Political Science and Comparative Constitutional Law*, on the importance of the amending process Glynn interrupted to cite the same authority against Isaacs' whole position. Isaac proceeded to cite Goldwin Smith, J. G. Carlisle (President Cleveland's Secretary of the Treasury), and Leonard Courtney on the over-rigidity of the American Constitution.

[4] *Ibid.*, p. 725 *et seq.*

In the course of the debate Deakin remarked that the new proposal would have more value for the United States than for Australia, since in a responsible government the executive would be bound to work for a solution in case of deadlock; at the same time he believed that the executive would fail so seldom that the proposed solution was quite safe.[1] Symon objected to the possible ignoring of the senate. Reid pointed out that the proposal enabled the senate to initiate an amendment and left that chamber quite the equal of the house of representatives; he insisted that in America it had been much too difficult to secure even the consideration of a proposed amendment. He desired a requirement, however, that if both houses did not agree to the amendment the one house must agree to it in two successive sessions.[2]

Glynn agreed that some reasonably easy way of initiating amendments ought to be adopted; he summarized the history of amendments in the United States and observed that only five important changes had been made in the American Constitution in 110 years, for the first ten were simply a bill of rights and not really amendments at all; furthermore, the remaining five were carried under extraordinary circumstances—four (sic) by means of the military power of the North. Glynn recalled that the Constitution of the Confederate States had provided that if three states requested an amendment a national constitutional convention should be summoned, and if the amendment were approved by the convention and ratified by two-thirds of the states (not three-fourths, as required by the United States Constitution), it should take effect. He also summarized Burgess' suggestion that if a proposed amendment were agreed to by the houses of

[1] *Melb. 1898 Debs*, vol. i, p. 730 *et seq*. He suggested that the states might well be empowered to require the consideration of a proposed amendment.

[2] *Ibid.*, pp 731 *et seq*, 735 *et seq* Isaacs agreed to Reid's suggestion. Higgins desired this provision even if the houses agreed. *Ibid.*, p. 740.

two successive Congresses in joint session it should become effective when ratified by the state legislatures, whose ratification however, should be weighted according to the state's strength in the electoral college. Glynn objected to the referendum because it undermined responsible government, and added that many American states had adopted it only to abandon it again. He desired to retain the amending process which had already been accepted by the Convention, but to add, as an alternative, a purely parliamentary process: the proposal must be adopted by both houses twice, with a periodical senatorial election intervening, and the majority in the senate must include at least half of the senators from each state while the majority in the house of representatives must include at least one-third of the representatives of each state [1] Glynn warned that if the constitution were made rigid the judges would become legislators, as had happened in the United States Many members spoke against the Isaacs amendment, objecting that the referendum threatened the senate, or that responsible government would suffer, or taking the attitude that the amending process had already been made sufficiently easy. Barton, maintaining this last view, explained the American system once more to show how much easier was the Australian plan presented by the Committee on Constitutional Machinery.[2]

Isaacs' proposal was decisively defeated,[3] and the clause was adopted without change. A recommendation that proposed amendments be referred to the state parliaments instead of to the electors was defeated without discussion or division.[4]

[1] *Melb 1898 Debs*, vol. 1, p. 736 *et seq.* Glynn moved this plan later but without success. *Ibid.*, p. 771 *et seq.* Massachusetts was particularly cited as having tried the referendum only to abandon it.

[2] *Ibid.*, p. 749 *et seq.*

[3] *Ibid.*, p. 765.

[4] *Ibid.*, p. 765 *et seq.*

Isaacs still hoped to secure a more liberal method of initiating amendments, but the Convention adjourned without making any further changes in these clauses.

Three of the colonies ratified the Bill with the amending process agreed to at Melbourne, but there was so much objection to this provision in New South Wales that it was one of the few which was modified before the second referendum, in 1899.[1] As finally ratified, and as enacted by the Imperial Parliament, the Constitution was to be amended if the proposed change should be agreed to either by an absolute majority of both houses of Parliament or by an absolute majority of one house in two votes separated by at least three months, and then approved by a majority of the electors voting both in a majority of the states and in the Commonwealth as a whole.[2]

[1] *Supra*, p. 96, *infra*, p. 239.

[2] Const. Act, Sec 128.

CHAPTER VIII

THE BILL BEFORE THE PEOPLE, 1898-1899

THE campaigns for the ratification of the Constitution Bill in the various colonies gave the press and political leaders an opportunity to express their views on the measure which the second Convention had drafted The resemblances of the Bill to the American Constitution were mentioned frequently, sometimes with approval, sometimes with hostility. Both its supporters and its opponents appealed, as had the Convention members, to American experience, and, as before, both sides found such arguments as they sought. If silence meant assent or approval, most of the Bill was quite satisfactory as drawn. A few clauses, some similar to provisions of the American Constitution, others dissimilar, aroused much opposition.

The federal enabling acts which had been passed by five of the parliaments in accordance with the program adopted by the premiers at the Hobart Conference of 1895, provided that the completed bill should be referred to the people of the various colonies for acceptance or rejection. A warning of trouble ahead appeared in New South Wales in 1897, when Parliament passed a bill requiring a minimum of 80,000 affirmative votes for ratification instead of 50,000 as originally provided.[1] The *Sydney Morning Herald* was indignant,

[1] There was a demand for a requirement of 100,000, 80,000 was supported by Reid. *N. S. W. Debs.*, vol. 90, p. 3772; *Sydney Morning Herald*, October 13, 1897 (also October 26, November 25 and 27 and December 3).

blaming Reid and charging bad faith.[1] Obviously, however, a large part of New South Wales was disposed to be cautious. The influential *Daily Telegraph,* furthermore, was far from pleased with the work of the Sydney session, and declared that New South Wales' demands had been ignored, that the Bill did not provide for control by those who were to pay the taxes, and that the new draft was only the old derelict Bill of 1891 plus a clumsy provision for breaking deadlocks.[2]

These criticisms were repeated when the Melbourne session failed to meet the *Daily Telegraph's* views, and as the Convention finally adjourned an editorial on "The Convention Failure" pointed again to the lack of democratic safeguards, declared that federation was being gained at the price of representative government, condemned the fiscal provisions and the railroad clauses, and asserted that the Bill would lead to protection.[3] Dissatisfaction developed rapidly into strenuous opposition to the Bill; the *Daily Telegraph* desired a new convention and a new draft constitution,[4] and threw the full weight of its effective reporting and editing against the Bill.

The *Sydney Morning Herald* had followed the work of the Convention without committing itself very definitely on the decisions reached. Shortly before the close of the Melbourne

[1] *Sydney Morning Herald*, October 13. The *Daily Telegraph* agreed (editorials of October 14 and December 3). For Reid's side see his *My Reminiscences*, p. 161 *et seq.*

[2] Editorial, September 23, 1897

[3] *Ibid*, March 23, 1898 A strong demand for the referendum had been made on March 11.

[4] Its views are indicated by the titles of its editorials. "Probable Unfreedom of Federal Trade" (March 11); "Against Bogus Federation" (March 31); "Ignoring their Promise to the People" (April 11); "Federalism *vs.* Conventionism" (April 12), "Universally Condemned" (April 16); "Braddon's Blot"—a part of the financial settlement—(April 21); "The Federation at any Price Party" (April 28); "The Now or Never Fallacy" (May 20)

session, however, it came out for the Bill, taking the attitude that differences among the colonies were unavoidable and that compromises were necessary. One editorial observed that the new Bill was remarkably like that of 1891, but went on to declare that federation had become even more urgent than it had been six years before; foreign complications had increased and dangers of disunity. The *Sydney Morning Herald* considered the Bill liberal; neither the executive nor the Senate were to have the large powers assigned them in the American Constitution.[1]

The Sydney *Bulletin*, although its plan for a federal government had been more radical[2] than that of the *Daily Telegraph*, promptly accepted the 1898 Bill, which it characterized as good, though not ideal. The *Bulletin* reasoned that the desirability of federation was generally admitted; a better bill might be secured by waiting, though that was doubtful; and, finally, the Bill could be amended if that proved necessary. The *Bulletin* believed that it was the most liberal constitution in the world.[3]

Barton, O'Connor, Wise and McMillan came out at once and strongly for the Bill. Barton pronounced it the most "bold, free and liberal" constitution in the world, and immediately started the campaign for ratification; a federal organization was formed, and he began a series of speeches which were well received.[4] Copeland declared that the Bill was admirable, far ahead of the United States Constitution, and better than the 1891 Bill; he proposed to stump for it.[5]

[1] *Sydney Morning Herald*, March 16.

[2] *Supra*, p 78 *et seq.*

[3] Issue of April 30, 1898. See also the editorial of May 21, "The Best Constitution on Earth". The Sydney *Evening News* also supported the Bill.

[4] *Sydney Morning Herald*, March 25, 26, 28 and April 1 and 7.

[5] *Ibid.*, March 31.

McMillan declared that it was broader and freer than the British Constitution.[1]

On the other hand the anti-federalists in the Assembly, led by Neild, were still cool towards the Bill; Want, the Attorney-General, proposed to continue his opposition; the Political Labour League came out against the Bill; and a Pro - Federation - Anti - Commonwealth - Bill Party was formed.[2]

The Protectionist Party resolved that each member might take any attitude he liked towards the Bill, and the Labour Party, which declared for federation but against the Bill, did likewise.[3] Lyne finally came out against it, objecting to the constitution of the Senate and to the expense of federation.[4]

Reid, who was known to be dissatisfied with several provisions, waited until a few days after the adjournment of the Convention to express his views on the final Bill. He then summarized its weaknesses and disadvantages, and advised New South Wales to decide carefully He considered himself bound to vote for the Bill, but he said publicly that he could not urge his constituents to do so.[5] As the campaign progressed his criticisms became increasingly definite and sharp, though he still declared that he considered himself bound to vote for it.[6] He disliked the grant of great power to the Senate, though the demands of the smaller colonies had

[1] *Sydney Morning Herald*, March 21, 22 and 23; *Daily Telegraph*, March 25 and 29

[2] *Sydney Morning Herald*, March 23, 31, April 1 and 2.

[3] *Ibid.*, April 6.

[4] *Ibid*, April 6.

[5] *Ibid.*, March 28; *Daily Telegraph*, March 28. The *Daily Telegraph* criticized his vagueness on March 29, 30 and April 1. See also Reid, *My Reminiscences*, p. 165 *et seq.*; Wise, *op. cit*, p. 263 *et seq.*

[6] *Sydney Morning Herald*, May 13 (Goulbourn speech); May 21 (Bathurst speech); and May 27 (Newcastle speech).

made that necessary, but he considered the provisions in regard to the Senate more liberal than those of the American Constitution. The expense of federation would be great, he added, and he regretted the absence of Queensland from the proposed union. He promised to work for federation even if the Bill failed, and if nothing else was possible he would even try to have New South Wales join the Federal Council.[1] His attitude was sharply atacked by the federalists, although the *Daily Telegraph* rather approved of it.[2]

Barton and his associates repeatedly found it necessary to deny that the Bill was a "slavish copy" of the American Constitution.[3] Barton pointed out that both houses of Parliament were to be elected by the people and that both were to be subject to dissolution. They also had to insist repeatedly that the Bill could be more easily amended than the American Constitution.[4] Again they had to deny that state rights, rather than slavery, caused the American Civil War.[5] Lyne prophesied civil war, as in the United States. Sydney Smith, on the other hand, presently claimed that the advantages of union were so great in the United States that 4,000,000 had become 70,000,000![6]

Mr. G. B. Barton, who had edited the 1891 Bill with notes,

[1] The *Sydney Morning Herald* objected to this; so did Turner of Victoria. Issues of May 14, 16 and 17.

[2] The most biting attack came from the Sydney *Bulletin* in a series of diabolically clever cartoons; Mr. Reid, "an enthusiastic federalist", was shown seated in both ends of a boat, rowing against himself (May 21); he was shown facing both ways (April 23); the difficulties of getting a greased pig (Mr. Reid) into a pen (the Commonwealth) were portrayed (May 28); and again Mr. Reid was shown busily engaged in hanging Mr. Reid (June 4).

[3] *Sydney Morning Herald*, April 6. See also the issue of April 26.

[4] *Ibid., April* 16, 20, 21 and May 7.

[5] *Ibid*, April 21, 26, 27, 29, 30 and May 2.

[6] *Ibid.*, May 12.

in 1897 and 1898 wrote for the Sydney *Evening News* a series of articles criticizing the new Bill.[1] Mr. Barton explained that although he was not opposed to federation his study of the 1891 Bill had made him doubt the wisdom of following the American Constitution, an attitude which had been confirmed by his later studies. He declared that he appreciated the American Constitution: the more he studied it the more he admired it—but the less he liked it. He objected to introducing a complex system of government foreign to Australian experience, and which would have the effect of developing all of the Australian and many of the American political vices; there would inevitably be corruption, incessant strife between the federal and provincial parliaments, and perpetual agitation. The omnipotent caucus would rule. He complained that the Convention had adopted American usages, principles and precedents wholesale; the convention system, the entire 1891 Bill (obviously an exaggeration), the names and constitution of the House of Representatives and the Senate, the principle upon which the powers had been distributed between the federal and provincial governments, the name "State", the federal judiciary, the abolition of appeals to England, and frequently even phraseology, had all been taken, he said, straight from the United States. He asked whether Australians really approved the American organization of government. The example of Canada, he reminded his readers, could have been followed in 1891; its government had stood the test of thirty years.[2]

Later Mr. Barton complained that some parts of the Commonwealth Bill had been taken from the Canadian and others from the American Constitution, although the two were

[1] Under the title "Notes on Australian Federation and the Draft Constitution Bills framed by the Conventions of 1891 and 1897". Reprinted in *N. S. W. P. P.*, 1897, vol. ii, pp. 343-404.

[2] Sydney *Evening News*, February 18, 1898.

utterly opposed; he asked if something original, not a patchwork, was not possible.[1] Again he recalled that when Canada had framed a constitution the example of the United States had been rejected, and he warned that Canadians knew the United States much better than did Australians.[2] Later he protested, somewhat gratuitously, it would seem, that it was "natural enough that a Canadian patriot should be mortified on finding the type of federal government chosen by his own countrymen discarded by Australian statesmen in favour of the American, especially when so much trouble had been taken to model the former on strictly British lines". The Australian constitution, he urged, ought to be neither Canadian nor American, but Australian,[3] a commentary, perhaps, on Sir Samuel Griffith's admission that he preferred the American Constitution, and advocation of the American type of cabinet and of the election of state governors.[4]

Equal state representation and the recognition of state rights were severely criticized by Mr Barton Canada was a federation in appearance rather than in reality (he later referred to the Dominion as a legislative union); the provinces were not powerful, and senators were nominated by the Crown. State rights had been quickly disposed of there; in the United States their recognition had caused civil war. Mr. Barton quoted Bryce on the frequent clashes between the two houses of Congress[5] He expressed alarm at the repub-

[1] Sydney *Evening News*, March 11.

[2] *Ibid*, March 26

[3] *Ibid.*, May 7.

[4] *Supra*, p. 119.

[5] *Ibid.*, March 26. See also the article in the issues of March 18 and April 1, the latter asserting that in America the Senate overshadowed the House of Representatives. The article of April 29 dealt with the distribution of powers and with state rights, and that of May 22, which quoted Patrick Henry, Hamilton, Calhoun and Webster, dealt with state rights.

lican tendencies of the Bill The name Commonwealth was condemned; it was not popular in Australia (no tobacco, whiskey, or horses had been named for it!), and it was a "Yankee term, quite in keeping with a measure which bears the stamp of American influence on every page"; to an American the word meant a republic pure and simple, and Bryce had used it correctly.[1] Mr. Barton also objected to the names "Senate", "House of Representatives", and especially "State", for they would teach the youth of Australia to look forward to a commonwealth which would be a republic; "States" came straight from the Fourth of July, and the draft constitution as it stood was a bill "to oust the Crown".[2] Considerable fear of the High Court which, it was pointed out, resembled the American Supreme Court, was also expressed.[3]

The attitude of the extremists toward the Senate and the question of deadlocks moved the *Sydney Morning Herald* to publish a parody "anti-bill manifesto", in which it was proposed that the "legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives and New South Wales", while the "Senate shall be composed of six senators from each State and as many senators, equal to the total number, to represent New South Wales. Each senator shall have one vote except in the case of the senators representing New South Wales, who shall have as many votes as they like"—in order to prevent deadlocks! New South Wales would contribute what she could spare, together with her blessing, and there would be a protective tariff for New South Wales but nowhere else. The rest of the manifesto, it was added, was mostly silence![4]

[1] Sydney *Evening News*, May 7.

[2] *Ibid.*, May 13.

[3] *Ibid.*, June 10 and 22

[4] *Sydney Morning Herald*, April 23

The actual Anti-Bill Manifesto, which was published the following day, declared that equal state representation in the Senate would end majority government, that the deadlock provisions were a fraud, enabling 860,000 electors to outvote 2,340,000, that the Senate could paralyze business and the government, and that, in its most objectionable features, the Bill was a slavish copy of the United States Constitution. It was further objected that the financial burden upon New South Wales would be heavy, that the capital would surely be in the far south, and that the proposed constitution was too difficult to amend. The manifesto advocated gradual federation, starting with New South Wales, Victoria, and Queensland; with them majority rule would be possible, and eventually the other colonies would have to join.[1]

The campaign ended with special demonstrations on both sides—at one federalist meeting in Sydney the American and British flags were placed on either side of the flag of Australia—, and with a burst of more than usual energy on the part of the *Daily Telegraph*, which sent a special anti-bill issue to every elector. The *Sydney Morning Herald*, quite correctly, prophesied a majority for federation, but that was not enough; in the poll on June 3, 71,595 votes were cast for the Bill and 66,228 against it. Since 80,000 affirmative votes were required the Bill failed of ratification The *Sydney Morning Herald* held Reid responsible;[2] Barton placed the responsibility on the *Daily Telegraph*, which accepted it willingly, and announced that the Bill had gone forever.[3]

Reid promptly proposed a conference of the premiers, but he needed to strengthen his position if he desired to gain the attention of the other colonies, which had declared decisively

[1] *Sydney Morning Herald*, April 24.

[2] Issue of June 6.

[3] Issues of June 4 and 6.

for the Bill and were inclined to be critical of the failure of New South Wales to ratify it.

In Victoria, as among the Victorian representatives in the Convention, there was dissatisfaction with several features of the Bill as it was adopted at Melbourne. The attitude of the powerful Melbourne *Age* seems to represent faithfully the development of Victorian opinion. *The Age* did not favor equal state representation in the Senate and accepted the arrangement only grudgingly.[1] It was far from satisfied with the deadlock settlement,[2] and it sharply criticized the financial arrangements.[3] It at first frankly sympathized with Reid's attitude.[4] But—in spite of *The Age*—the Australian Natives Association, the various federal organizations, the cabinet and an increasing number of public meetings declared for the Bill. Presently Turner and Isaacs announced that they would support it, though they admitted that it had defects.[5] The former declared that it was more liberal than that of 1891, and that the Senate could do no harm.[6] By the time of the referendum on June 3, *The Age,* was able to support the Bill, although with very little enthusiasm[7]

The Argus was stronger in its approval; it admitted that

[1] Editorials, January 10, 21, 1898.

[2] *The Age*, March 21.

[3] *Ibid*, March 14, and article of March 22

[4] *Ibid.*, March 30. For the change in attitude towards him see the issues of May 18, June 4, 9 and 14.

[5] *Ibid*, April 14 and 15, reporting their speeches. Murdoch, in his *Alfred Deakin*, attributes the final success of the Bill to Deakin who, Murdoch states, virtually defied *The Age* and forced it to change its stand.

[6] *Ibid.*, April 19 (Castlemaine speech). See also the *Sydney Morning Herald*, March 15 and 18

[7] Issue of May 31.

there were weaknesses, but throughout the campaign for ratification it urged acceptance.

There was, nevertheless, some very vigorous and unrelenting opposition to the Bill. The Trades Hall Council, a labour organization, early declared against it, though Trenwith supported it and tried to win the Council over;[1] McLean resigned from the cabinet in protest against the Bill.[2] Higgins campaigned against it with his usual force, and Sir Bryan O'Loughlen, though he claimed to be a federalist, refused to accept this constitution. An anti-Federalist League was formed by the Trades Hall Council, and a manifesto was issued which stressed alleged weaknesses in the Bill, particularly the provision for what was termed minority rule and the clauses dealing with finance, bounties, bonuses, trade, and Victorian coal.[3]

The manifesto of the Australian Federation League, signed by Deakin, insisted in reply that the Bill was not a copy of other constitutions, that it was democratic, that the citicisms of the Senate were exaggerated and that similar provisions had worked well in the United States and Switzerland, and that the financial arrangements were reasonable [4]

The poll resulted in an overwhelming victory for the Bill; 100,520 votes were cast in favor with only 22,099 opposed. *The Age* was now bitter at Reid, and did not receive his proposal for a premiers' conference cordially.[5] Turner was reported to believe federation possible without New South Wales, though Isaacs was said to dissent; Deakin was represented to be against making any further concessions to the

[1] *The Age*, March 25, 29 and April 13.

[2] *Ibid.*, April 18.

[3] *Ibid.*, April 15 and May 3.

[4] *Ibid*, May 25

[5] Issues of June 4, 9 and 14

northern colony.[1] Turner did not definitely reject Reid's proposal, but the refusals of the other premiers made the meeting impossible for the time being at least.[2]

The Argus refused to be discouraged by the result in New South Wales, reminding its readers of the delays in the United States and Canada; Massachusetts had waited for a time, and Samuel Adams, "the greatest man whom Massachusetts has produced", and Hancock had opposed the Constitution. *The Argus* favored accepting Reid's proposal, and believed that New South Wales could be won over.[3]

In South Australia the federalists won an easy victory. The more extreme state rights members of the Convention had sometimes been moved to hint that any limitations upon the power of the Senate would make federation undesirable to South Australians, but in the end these leaders supported the Bill. The *South Australian Register* did likewise,[4] its enthusiasm for the Bill being rivalled only by its bitterness at Reid when New South Wales failed to ratify. The colony approved the Bill by a vote of 35,800 to 17,320. Reid's overtures for a reopening by the premiers of some of the clauses of the Bill were sharply rejected by Kingston.

The Tasmanian members of the Convention were early reported to be in favor of the adoption of the Bill,[5] and Braddon started a speaking campaign in March.[6] The Ho-

[1] *The Age*, June 6 and 14.

[2] *Ibid.*, June 13 and 14.

[3] Issue of June 7.

[4] For strong state rights editorials see the issues of September 14 and 16, 1897, with additional objections to the work of the Sydney session on September 21 and 28. For support of the Bill see the issues of May 9 and 23 especially, and—the climax—June 3.

[5] *Sydney Morning Herald*, March 15.

[6] *The Age*, March 25. Wise was in the colony speaking for the Bill in May. *Ibid.*, May 17; Launceston *Examiner*, May 24.

bart *Mercury* did not like the Bill as it was adopted at Melbourne;[1] it was strongly in favor of federation but disliked the financial clauses and did not believe that Tasmania could afford to join the Commonwealth. Nor did the *Mercury* favor the deadlock provisions. After the reverse in New South Wales the *Mercury* nevertheless declared that federation was a necessity; the financial difficulties must be removed. It was pleased with the extent to which the people had been aroused.[2]

The Launceston *Examiner* thoroughly disagreed with those Tasmanians, led by Bird, who opposed the Bill because they believed that the colony could not afford to federate, and stressed the desirability of nationhood and unity, of free customs, of a more powerful voice in imperial affairs, and of wider markets, citing the example of Canada and the United States.[3] The Bill was accepted by a vote of 11,797 to 2,716.

Following the failure of the Bill in New South Wales, the *Examiner* wished to go ahead without the northern colony, following American precedent; Virginia and New York had joined after nine others, and North Carolina and Rhode Island had entered a year late.[4]

The 1898 Constitution Bill was not hailed enthusiastically in Western Australia. Promptly upon his return from Melbourne Sir John Forrest announced that he would support it and seek to secure its reference to the people. He declared that he had tried in the Convention to get the best possible terms, and that he had secured very fair terms; fed-

[1] Issue of March 18

Issues of June 6 and 7.

Especially the issue of May 27.

[4] Issue of June 8. The *Examiner* was under the impression that there were seventeen states when the Constitution was submitted for ratification. See also the Melbourne *Age* of June 9.

eration certainly would not be disastrous, and he welcomed the prospective union of the continent.[1] He believed that there would be increased influence in speaking with one voice, that there would be wider markets, a transcontinental railway, as in Canada and the United States, and advantages in a single system of defence and in uniform law. He considered the Bill a good one, as good as was likely to be secured, although he objected to the manner of electing the Senate. He admitted that there would be a financial strain upon the colony for a time, but Canada and the United States had prospered, and he was optimistic.[2] Leake, the Opposition Leader, also supported the Bill,[3] and an active Federal League was formed.[4] Considerable opposition developed, nevertheless, largely on the ground that the colony was not yet ready to federate. On the whole the failure of New South Wales to ratify was a relief to Western Australia; the *West Australian* remarked editorially that no action was now needed and the question could be dropped.[5] Forrest rejected Reid's proposal for a premier's conference, saying that he was unable to attend.[6]

In Queensland the Government had had to abandon its efforts to have the colony participate in the making of the constitution bill, though the Brisbane *Courier* did not give up the fight for federation. Little comment was made on the various decisions reached in the Convention;[7] the final draft

[1] Speech at Northam, April 21, 1898, reported in the *West Australian* of April 22.

[2] Speech at Perth, May 27, under the auspices of the West Australian Federation League, reported in the *West Australian* of May 28

[3] Speech at Albany, May 28, reported in the *West Australian* of May 30.

[4] *Ibid.*, May 17, 24.

[5] June 6.

[6] *Ibid.*, June 12.

[7] Editorial, March 15, 1898.

was commended, although in general terms only.[1] The federal campaigns in all the colonies were carefully followed, but especially that of New South Wales; the *Courier* and Byrnes, who had suceeded Nelson as Premier, both believed that New South Wales held the key to federation.[2] Following the New South Wales poll of June, 1898, Byrnes was the only premier who received Reid's invitation with any cordiality, the refusal of the others promptly made it evident that his willingness to join in the deliberations could not, for the present, produce any result.[3] The other federal leaders were disposed to ascertain whether Reid or Barton was the real federal leader in New South Wales Perhaps they would not have been unwilling to find that it was Barton.[4]

The issue between Reid, who demanded changes in the Bill, and Barton, who was willing to accept it as it stood, was promptly joined in a parliamentary election in which the two leaders campaigned for the same seat Barton presently announced that he would work for the modification of the three-fifths majority on the joint sittings of the two houses, for the omission of the Braddon finance clause, and for the location of the federal capital within the boundaries of New South Wales;[5] Reid proposed to allow the Senate no power to amend money bills, and to define more closely the rights of states to use rivers for irrigation purposes.[6] Lyne now supported Barton.[7] The *Sydney Morning Herald* was opposed

[1] *West Australian*, March 18

[2] *Ibid*, March 28, April 1 and May 31.

[3] *Sydney Morning Herald*, June 13, Wise, *op. cit.*, p 286 *et seq.*

[4] Wise, *op. cit.*, p. 289.

[5] *Sydney Morning Herald*, June 20, July 13, Wise, *op. cit.*, p. 292; Quick and Garran, *op. cit.*, p. 215.

[6] *Sydney Morning Herald*, June 20 and July 11; Wise, *op. cit*, p. 290; the *Morning Herald* was very critical of the Reid program. June 20.

[7] *Sydney Morning Herald*, July 5.

to Reid,[1] and the *Bulletin* supported Barton strongly, but the *Daily Telegraph* supported the Premier with its usual intensity and with a liberal insertion of personalities into the campaign. Reid defeated Barton and the Government carried the election, though by a dangerously narrow margin Barton was soon returned for another district, and Lyne yielded the leadership of the Opposition to him [2]

Obviously the Government could not delay proceeding with federation, and Reid now submitted to the New South Wales Parliament a list of proposed modifications. He desired that in joint sessions a simple majority be substituted for the three-fifths majority adopted at Melbourne, that a national referendum be made an alternative to the joint session, that the federal capital be in New South Wales, that alteration of the boundaries of a state be subject to the approval of a majority of the voters of that state, that there be additional safeguards concerning the use of rivers for irrigation and conservation, that no money bills be amended by the Senate, that appeals from the state courts be exclusively either to the Privy Council or to the High Court, that the Braddon clause, requiring the return to the states of at least three-fourths of the customs and excise revenue, be struck out, and that the other financial clauses be reconsidered if possible.[3] In supporting his proposals Reid expressed his unwillingness to accept equal state representation in the Senate if in the last resort the will of the people was not to prevail; a simple majority must be able to carry measures in joint sessions In speaking of the federal capital Reid remarked that Washington was a despotism, under the absolute rule of the Presi-

[1] See especially the issues of July 5 and 25.

[2] *Sydney Morning Herald*, October 6

[3] *N. S. W. Debs*, vol. 93, p. 340; *Sydney Morning Herald*, August 25; Wise, *op. cit.*, p. 308 *et seq.*; Reid, *op. cit.*, p. 173 *et seq*; Quick and Garran, *op. cit.*, p 216 *et seq.*

dent,[1] and was the best governed part in the United States.[2]

Lyne moved amendments which authorized negotiations with other colonies but which declared the laying down of preliminary conditions to be inadvisable. Like Reid, he hoped that Queensland would join in the deliberations. Reid was sustained by a vote of fifty-eight to forty-four.[3]

In the consideration of the resolutions the Senate came up for further discussion. Nicholson, who had lived in both the United States and Canada, assured the Assembly that equal state representation in the Senate was generally known to be a great drawback. Mr. Griffith, who believed that the American Constitution was something to be avoided, presented an interesting picture of the circumstances under which the Thirteen States federated. British ships were patrolling the coast, ready to attack if necessary, and British troops held the strongholds of the country! Washington, Mr. Griffith added, made the Constitution rigid to check the large loyalist minority and to prevent a reaction![4]

Barton's attempt to strike out the request for a popular referendum to end deadlocks was lost by a vote of forty-four to nineteen.[5] W. M. Hughes' mention that Sydney be the capital, was, however, defeated by a vote of eighty to twelve. The resolutions were, in the end, adopted by the Assembly. The Council, however, struck out the provision for a national referendum, added a requirement that the capital be Sydney,[6] provided that appeals to the Privy Council be maintained un-

[1] More accurately, of course, under the rule of Congress.

[2] *N. S. W. Debs.*, vol. 93, pp. 324 *et seq*, esp. pp. 355 *et seq.*, 360

[3] *Ibid.*, vol. 93, p. 677; Wise, *op. cit.*, p. 312.

[4] *Ibid*, vol. 94, p. 2091 *et seq.* His remarks about the Civil War were scarcely more accurate.

[5] *Ibid.*, vol. 94, p 1030.

[6] By a vote of 15 to 14.

changed,[1] and modified the proposals in regard to the amending process.[2]

With Parliament supporting him, Reid was in a position to open negotiations with the governments of the other colonies. In December he proposed a Premiers' meeting to be held at Melbourne in January, 1899, at which Queensland should be represented. Dickson, the new Premier of the northern colony, had already expressed his willingness to attend.[3]

The Conference succeeded in reconciling the conflicting attitudes of the premiers The small colonies finally gave way and accepted a simple majority for the passage of bills in the joint sessions of the houses of Parliament The capital was to be in New South Wales, though not within one hundred miles of Sydney, and temporarily was to be at Melbourne The Braddon clause, of which Sir Edward himself was the sole strong supporter, was to operate for ten years only. The popular or national referendum proposed as a method for amending the Constitution, failed of adoption, but the difficulty of the amending process was somewhat lessened by providing that measures should be sent to the people after passing one of the houses of Parliament twice. Queensland, where conditions made the single senatorial electorate undesirable, was permitted to form more than one district if the Queensland Parliament so decided.[4]

The changes were generally satisfactory. Reid now com-

[1] *N. S. W. Debs.*, vol. 94, p. 2946.

[2] *Sydney Morning Herald*, December 24.

[3] Mr. Byrnes had died suddenly in August.

[4] *Ibid.*, January 31, February 1 and 3. The report of the Conference was printed in the same paper on February 9. No changes were made in the clauses concerning inland rivers, money bills, or appeals to the Privy Council. See also Wise, *op. cit.*, p. 315 *et seq.*; Quick and Garran, *op. cit.*, p. 218 *et seq.*

mitted himself definitely to the Bill; Sir Edward Braddon was content; Dickson was very much pleased; Barton (who was in Melbourne at the time of the Conference) and Turner expressed themselves as satisfied

Progress was now rapid and fairly easy. Reid and Barton were reconciled and agreed to cooperate,[1] federal organizations endorsed the changes,[2] the Queensland Parliament was dissolved to make possible an election in which federation should be the issue,[3] and special sessions of the Parliaments were summoned to pass new enabling bills for a referendum on the amended Bill.

In New South Wales an enabling bill passed the Assembly quickly,[5] but the Council added restrictions which the Government and Assembly would not accept; a new session was held in which the Council was forced to give way, and the two houses finally agreed on April 20.[5] Parliament was then recessed until July, and the final campaign for the Bill was undertaken. At Sydney the Australian Federation League, the Federal Association of New South Wales, and the Labour Party federalists met and established a united executive to direct the campaign for ratification.[6] Wise, Barton and Reid undertook speaking campaigns, and the *Sydney Morning Herald,* as previously, threw its influence in favour of the Bill, and even forgave Reid.[7]

Meanwhile the opponents of the Bill were equally active A manifesto was published calling attention to the lack of any expert inquiry into the financial results of federation, and

[1] *Sydney Morning Herald,* February 17; Reid, *op. cit.,* p 181.

[2] *Sydney Morning Herald,* February 17, 18.

[3] *Ibid.,* February 16.

[4] *N S. W. Debs.,* vol. 97, pp. 137, 140, 263, 395.

[5] *N. S. W. Debs.,* vol. 99, p. 323

[6] *Sydney Morning Herald,* April 25.

[7] Issue of May 30. The issue of June 6 was especially full.

objecting that the " Braddon Blot " was still in the Bill, that the capital could remain indefinitely at Melbourne, that nine Tasmanian votes still equaled five New South Wales votes in the House of Representatives, that the same man could hold two offices in the ministry and draw two salaries, that the small states would pack the ministry, that Queensland could not join, that the tariff would greatly injure New South Wales, and that the results would be increased costs to the farmer, the miner, and the tradesman.

Objections that the proposed amending process was too difficult finally brought from the *Sydney Morning Herald* an editorial in reply, which emphasized the liberal features of the Australian process; the United States Constitution had no provision for a referendum and required a two-thirds majority in both houses of Congress and a three-fourths majority of all the States, while in Australia an absolute majority of the two houses, or of one house twice, and a simple majority of the states was all that was to be required. Bryce's approval of making the amending process not too easy was cited.[1] The *Sydney Morning Herald* also reminded the opponents of the Bill of the dire predictions of disaster which had been made in America, and of their obvious failure to be borne out by events.[2] Dibbs nevertheless still held that the Bill was " nothing but a Chinese [i.e., literal] copy of the American Constitution, which was formed in dire necessity ", and which was as likely to bring a civil war to Australia, as it had been to the United States.[3] Lyne, who was also opposing the Bill, preferring unification, likewise used the American Civil War as an argument. He declared that in the United States 1700 amendments had been proposed and only 15 carried.[4]

[1] May 13.

[2] May 30.

[3] *Ibid.*, May 23. (Paddington speech).

[4] *Ibid.*, May 31. W. M. Hughes of the Legislative Assembly was also opposing the Bill. *Ibid.*, May 9.

In the poll, held on June 20, these leaders of the opposition were supported by a large minority of the voters, but they were nevertheless decisively defeated by a vote of 107,420 to 82,741. The opponents of the Bill (or, as the federalists charged, of federation), were still unconvinced; Want declared that the vote was a complete mystery to him, and that he would still do anything to block federation,[1] but an address to the Queen was quickly passed in both houses, praying for the enactment of the Bill by the Imperial Parliament, and interest shifted to the progress of the movement in the other colonies.[2]

In Victoria *The Age* was much better pleased with the Bill as modified by the premiers; it considered the adoption of the dual referendum as a means of amending the Constitution a great improvement.[3] In commenting on the fear of the liberals that equal state representation in the Senate would make trouble, *The Age* assured its readers that there was no need for apprehension; the Bill was not perfect, but it was entirely workable. *The Age* would have preferred the omission of the two to one rate between the House of Representatives and the Senate, the federalizing of the railways, and some modification of the financial arrangements, but nevertheless cordially accepted the Bill and desired a large vote [4]

Opposition to the Bill almost disappeared, and the poll resulted in the swamping of its opponents by 152,633 to 9,805. An address to the Queen was promptly passed by Parliament.

The changes made in the 1898 Bill by the premiers were not calculated to increase South Australia's satisfaction with

[1] *N. S. W. Debs.*, vol. 99, pp. 589, 722

[2] Quick and Garran give an account of this campaign, *op. cit.*, p. 221 *et seq.*

[3] Editorial, July 21.

[4] July 21 and 27.

it, but the protests there did not endanger federation. Following Reid's success in the July elections of 1898, Kingston, who originally had refused the invitation to attend a premiers' conference, accepted a new invitation, and he concurred in the changes to which the Conference agreed. In February, 1899, he introduced a second enabling bill to provide for a referendum on the amended Bill [1] Sir John Downer made a last state rights speech against the modification of the three-fifths provision. Even that had been a concession, he said, and now the premiers had given away "the very groundwork of federation"; the result would be amalgamation, the destruction of the smaller colonies, and their absorption by the larger ones.

Glynn, on the other hand, declared that the time had come for federation, and South Australia had best join while there was opportunity for preserving some local influence. No powers had been delegated to the federal government which involved state rights, and the small states would have enough influence in one house to give the legislation "a color of our local temperament", and "as long as we have in the Senate six representatives—an equal number to that of a state five times the population of ours", South Australians should be satisfied. As for the deadlock provisions, the small states could not be overwhelmed by sheer numbers except by "the ordeal of two Parliamentary conflicts, a dissolution, and then another conflict of the two houses". Abstract ideas should be put aside, and the substance of the good which was offered should be taken; the Bill was not perfect, but absolute perfection could not be expected, and federation was worth the price of the imperfections.[2] Both houses of Parliament took the same view [3] and the enabling bill was passed.

[1] *S. A. Debs*, Assembly, 1899, p. 1222.

[2] *Ibid.*, p. 1228 *et seq.*

[3] *Ibid*, p. 1234.

The electorate again expressed itself decisively in favor of the Bill, adopting it by a vote of 65,990 to 17,053. An address to the Queen was then carried with no difficulty [1]

In Tasmania there was still some feeling that the colony could not afford to federate; the Hobart *Mercury* was still unenthusiastic, though it accepted federation as inevitable. After the poll, in which the electorate declared for the Bill by 13,437 to 791, the paper declared that the Bill had been accepted and the people must take the consequences.[2]

In Queensland, Dickson, as soon as he heard that the New South Wales Parliament had acted,[3] introduced a measure providing for the reference of the Bill to the people of the northern colony. He informed the Assembly that he had tried to secure a new convention in which Queensland could participate, but that he had not succeeded; he had worked for some modifications at the Premiers' Conference, also, but without complete success. He expected general support of the enabling bill, from the Opposition as well as the Government supporters.[4]

Curtis found some fault with the Bill, though he admitted that in many respects it was better than the 1891 Draft. He remarked that the new Bill was "in a large measure a copy of the Constitution of the United States", though the circumstances were altogether different, and he later regretted that Canada had not been followed more closely, rather than the United States.[5] He particularly objected to the single senatorial electorate because of the size of the Australian colon-

[1] *S. A. Debs.*, 1899, Assembly, p 244; Council, pp 51-56 (August 3 and 8).

[2] July 28.

[3] *Sydney Morning Herald*, March 31 and April 19 and 21, 1899.

[4] *Qsld. Debs.*, Assembly, vol. lxxxii, p. 60 *et seq.*

[5] *Ibid.*, pp. 120 *et seq.*, 340 *et seq.*

ies. Stewart also objected to taking the United States as a model, and pointed to the extremes of poverty and plutocracy existing in that country, to political corruption and to what he termed the crushing of honesty. He believed that Canada and the United States would have been prosperous even without federation, and that in the United States federation had actually hurt prosperity, for great syndicates had been given an opportunity to rob more freely. Furthermore, the United States failed to secure correct representation of public opinion.[1]

Lesina's speech against the Bill was especially full of references to the United States. He strongly condemned equal state representation in the Senate, charging that it had been taken from the American Constitution, upon which it was actually the great blot. He, too, pointed to the extremes of poverty and great personal wealth in America He repeated the statement, frequently but incorrectly made, that the American States had federated while at war,[2] " federated in the face of the guns of the British nation ". He brought up the familiar contrast of Nevada and New York, and Bryce's conclusion that state rights had not suffered in the United States; the Senate had not protected state rights except in the case of slavery. The system now proposed would mean government by the Senate and by a minority; Lesina desired one chamber only, chosen on a democratic basis [3] He criticized the lack of any safeguard against the American spoils system, and he objected to the High Court, which made possible " the odious American system of ' Government by Injunction ' ", by which he seemed to mean the power of the Supreme Court

[1] *Qsld. Debs.*, Assembly, vol. lxxxii, p. 129 *et seq.* He mentioned Boss " Crocker " [Croker]

[2] Correct for the Articles of Confederation but not for the Constitution which was being discussed.

[3] *Ibid.*, p. 288 *et seq.*

to declare acts of Congress unconstitutional.[1] He spoke of the difficulty of amending the American Constitution and asserted that only one substantial amendment had ever been passed. He called attention to the provision in the American Constitution for the use of what he called the initiative: two-thirds of the state legislatures were able to call on the Senate for an amendment, and the Senate then had to send the amendment to the state legislatures.[2] Philp, the Colonial Treasurer, took exception to some of the statements which had been made. He declared that the United States had benefited from federation and was the most prosperous country in the world.

Little difficulty was encountered in the Council. Gregory objected to the popular election of senators, preferring the American system, which had been followed in the 1891 Bill.[3] Buzacot believed that there were many defects in the American Constitution and particularly disliked its rigidity.[4] In spite of these objections, however, the enabling bill was quickly passed through both houses.

Sir Samuel Griffith, now Chief Justice of Queensland, who had never ceased to be keenly interested in federation, and whose views were given respectful attention in all the colonies and in the sessions of the 1897-98 Convention, supported the 1898 Draft Bill. In 1897, after the Adelaide Session, he had prepared and presented to the Queensland Parliament

[1] *Qsld. Debs*, Assembly, vol. lxxxii, pp 293, 295.

[2] *Ibid.*, pp. 295, 296. His idea of the "initiative" was as confused as his idea of "government by injunction". Article V of the American Constitution provides that Congress, "on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments", which should then be referred to the States for ratification. This procedure has never been employed, and in any case can hardly be described as "the initiative".

[3] *Ibid.*, Council, p. 435.

[4] *Ibid.*, p. 437.

a criticism of the Bill as it then stood. He objected to the popular election of senators, which he thought particularly ill-adapted to Queensland conditions. He disliked the two to one fixed ratio between the House of Representatives and the Senate. As for the financial power of the Senate, he did not believe that the form in which the chamber proposed changes in financial measures mattered; a " strong Senate will compel attention to its suggestions; a weak one would not insist on its amendments . . . and this will depend upon public opinion ". Sir Samuel still preferred not to make responsible government compulsory If the Government was to be dependent upon the lower house, the control of patronage, judicial appointments and external affairs would go to the House of Representatives; judicial appointments, at least, might be made subject to the Senate's approval, as had been done in the United States. He warned, as he had done six years before, that responsible government might only be a passing phase.[1] In 1899, however, Sir Samuel dropped these criticisms and, urging that the question was federation or no federation, strongly favored the acceptance of the Bill; he declared that the Senate was to be more than a mere upper chamber, and pointed out that the state constitutions were not to be affected; he used Newfoundland as a warning against remaining out of the union, attributing the financial difficulties of that colony to its failure to join the Dominion.[2]

The federal campaign, directed largely towards the education of the electors, went on through the winter, reaching a climax in the first days of August, with public meetings, messages from the premiers of the other colonies, strong editor-

[1] *Qsld. P P.*, vol. xlvii (1897), pt. 1, p. 227 *et seq.*; *N. S. W. W. P. P.*, 1897, vol. ii, p 1 *et seq.*

[2] *Australian Federation and the Draft*, a paper read before the members of the Queensland Federation League, May 26, 1899 Reprinted in *Qsld. P. P.*, vol. xlix (1899), 1st Session, pt. 1, p. 83 *et seq.*

ials and effective paragraphing in the Brisbane *Courier*, and a great dinner on the evening of August 2, at which Barton was present. The poll went safely in favor of federation, by a vote of 38,488 to 30,996, and in October Parliament passed an address to the Queen petitioning for the enactment of the Constitution.[1]

The revival of the movement in the East after the failure in New South Wales in 1898 placed Sir John Forrest in a dilemma. He considered himself somewhat committed to federation by his participation in the Convention, and yet he was far from sure that Western Australia could afford to enter the union, and there seemed to be no great demand among the people for entrance. As the eastern colonies ratified, however, several political leaders came out definitely for federation, urging that the terms offered were equitable, that unity was desirable, and that Western Australia would be better off in than out of the Commonwealth; she was to be allowed to keep her own tariff for five years, she would have wider markets, her debt could be converted, and federation would attract capital to the continent and the colony.[2] The leader of the Opposition came out for the Bill.[3] Forrest, who had been forced to deny that he was opposed to federation and to declare that he would bring forward a bill providing for a popular referendum, said that there were two sides to the question, but that he favored accepting the Bill,[4] and the Labour Party declared for its adoption.[5]

[1] *Qsld. Debs*, vol. lxxxii, pp. 239-265, 291 *et seq* Quick and Garran give an account of this campaign; *op. cit.*, p. 223 *et seq.*

[2] Lefroy, Minister of Mines, at Gingin, July 4, 1899, reported in the *West Australian*, July 5. James, Leake, and Hackett also favored federating. *Ibid.*, July 6 and 16.

[3] *Ibid.*, July 18.

[4] *Ibid.*, July 19 (speech at Perth, July 18).

[5] *Ibid.*, July 27.

The *West Australian* apparently summed up the attitude of many when it said that " the Federalist mostly frankly admits that the strongest part of his argument rests on the consideration that if Federation offers no startling advantages at first, to refuse it would lead to such disaster for this colony that the dictates of ordinary prudence require that Federation should be accepted." [1] Nevertheless some preferred to run the dangers of remaining outside the Commonwealth,[2] and the Perth Chamber of Manufactures declared against federating.[3] The Bill was finally referred to a joint committee of both houses of Parliament.[4] which presently reported that the colony's customs duties would amount to £ 300,000 a year, necessitating some new form of tax, since income and land taxes would not suffice; that the removal of existing duties would harm producing industries and that wages would probably suffer, and labor be less in demand; that the size of the colony, the concentration of its population in a few centers. and the great conflicts of interest between groups in the colony, seemed to necessitate more than one electoral district, as had been permitted in the case of Queensland; that a transcontinental railway was essential, and that the Commonwealth should be empowered to construct one since defence, the post-office, and general federal purposes required it. The committee reported that its witnesses were against immediate federation; it had been difficult to secure evidence on the other side. The committee believed that the loss of customs revenue would be felt less as new industries were established.

[1] Editorial, July 30, 1899.

[2] Throssel, Commissioner for Crown Lands. *Ibid.*, July 6 (Northam speech of July 5); Piesse, Commissioner of Railways, *ibid.*, July 10; Lee-Steere desired to wait for ten years before entering. *Ibid.*, July 17 (Bridgetown speech of July 16).

[3] *Ibid.*, July 30 (meeting of July 28).

[4] *Sydney Morning Herald*, July 27.

Finally it maintained that four modifications in the Bill were essential if Western Australia was to accept it: first, the colony must be empowered to establish more than one senatorial electorate, second, the Commonwealth must be empowered to construct a transcontinental railway; third, the colony must be allowed to retain its customs five years after the imposition of common duties; and fourth, the Inter-State Commission must not exercise its powers within the colony for five years after the imposition of the common customs.[1] The objections were entirely economic; state rights and the power of the Senate played no part at this stage of the Bill's consideration.

An attempt to pass an enabling act for the reference of the Bill to the people was blocked by the Council. In May, 1900, however, under pressure from the federalist organizations, from the goldfields, and from Mr. Chamberlain, Secretary of State for the Colonies,[2] a new enabling bill was introduced and passed [3]

Forrest, though he had to abandon three of the four demands of the colony for special consideration, was able to secure acceptance of the provision that it should continue its own tariff for five years, and he was assured by South Australia of coöperation in building a railway connection with the East.[4] He himself then supported the Bill strongly, though he realized that there was some danger to the colony,

[1] *W. A. Votes and Proc.*, 1899, vol. iii, Paper A10; Battye, *op. cit.*, p. 446 *et seq.*; *Sydney Morning Herald*, September 21, 1899. There was no minority report.

[2] The Instructions to the West Australian delegate and the correspondence with Mr. Chamberlain are printed in *W. A. Votes and Proc.*, 1900, no. 1. See also *ibid.*, 1900, 2d Session, Paper No. 18. Chamberlain put the case quite strongly.

[3] *W. A. Debs.*, vol. xvii, pp. 8, 74, 265, 267 (Assembly), 295, 309, 323 *et seq.* (Council).

[4] Battye, *op. cit.*, p. 450 *et seq.*

and though there continued to be some hesitation on the part of other leaders [1]

The poll, taken on July 31, resulted in approval of the Bill (by then the Act), by the surprisingly decisive vote of 44,800 to 16,691.

In Western Australia, then, American precedent played almost no part. The issues, which were entirely economic, were essentially local, and in any case the West Australian leaders had been much less prone throughout the federal decade to cite precedents than had those of the eastern colonies

In the East, American precedents were frequently cited during the referendum stage, sometimes for illustrative purposes, sometimes as arguments. In the latter cases it is not often clear whether American example had convinced Australians or whether Australians who were already convinced turned to the United States to find support for their position; it is difficult to determine whether G. B. Barton of New South Wales and Lesina of Queensland were turned against the Bill by their knowledge of the operation of similar provisions in America, or whether, being strongly opposed to the Bill, they chose to base their opposition on what they regarded as evils in American political life. There was surely some attempt to stir up opposition to the Bill on patriotic grounds, through the decrying of foreign institutions and appeals to follow British precedents. Here, again, there is some question as to how many of the opponents of the Bill really considered it a "slavish copy" of the American Constitution, and on the other hand, as to how many of the federalist leaders who denied the charge believed that the American Constitution had not been followed to a very considerable extent.

On the whole, the discussions of the Bill at this period seem to indicate that the Australians, both the federalists and the

1 See the *Western Mail*, May 12, June 16, 23 and 30, July 7, 14, 28 and August 4, 1899, and Battye, *op. cit.*, p. 453.

" anti-Billites ", were quite aware of the resemblance of the new constitution to American provisions. Some of the remarks made in the Imperial Parliament while the Bill was being enacted show that its members were also conscious of the resemblances, and at the same time indicate that it was possible for those who recognized the similiarities to reach quite contradictory conclusions.

Chamberlain, in introducing the Constitution Bill and in sketching the history of the Australian federal movement, remarked: " I think it is true to say that, on the whole, this new Constitution, although it is in many important respects unlike every other Constitution at present existing, still in the main, and more than any other, follows the Constitution of the United States of America ". Contrasting the Australian and Canadian Constitutions, he added that the American Civil War had prejudiced Canadians against state rights, which had not been true of Australians [1]

Lord Selborne, Under Secretary of State for the Colonies, who introduced the measure into the House of Lords, also made some comparisons with the American Constitution, pointing out that the Australian document was more democratic, that, unlike the Canadian and American Constitutions, it possessed provisions for resolving deadlocks, that it provided for responsible government, and that its method of amendment was easier than that of the United States.[2]

Bryce, who surely was qualified to express an opinion, did not take up the point in any detail, though he remarked incidentally that the Bill was based upon the lines of the British Constitution, retaining responsible government, " and yet at the same time has borrowed many features from the Constitution of the United States ", together with some from Switzerland and Canada.[3]

[1] *Hansard*, vol. 83 (4th series), p. 46 *et seq.*

[2] *Ibid.*, vol. 85 (4th series), p. 8 *et seq.*

[3] *Ibid.*, vol 83, p. 785.

Haldane, commenting on Chamberlain's comparison of the Bill with the American Constitution, remarked that he did not "think the main features of the Australian Constitution will differ so materially, after all, from the Canadian Constitution of 1867 . . . the difference between the Constitution which the Bill proposes to set up and the Constitution of the United States is enormous and fundamental . . .", for the Bill, he pointed out, was permeated with responsible government; it was akin to the American Constitution only in its most superficial features, and in reality was a reproduction of the British Constitution upon a large and noble scale.[1] It is apparent, however, that resemblances, whether superficial or fundamental, attracted notice.[2]

[1] *Hansard, op. cit.*, pp. 97-102, especially 98

[2] For a later and different attitude of Haldane towards the American, Canadian and Australian Constitutions see *Appeal Cases* (1914), pp. 237-258 (*Attorney-General for the Commonwealth of Australia* v. *The Colonial Sugar Refining Company*), in which, delivering the judgment of the Judicial Committee of the Privy Council, he said that the British North America Act "departs widely from the true federal model adopted in the Constitution of the United States," while in "fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada" (p 253 *et seq.*).

CHAPTER IX

Conclusion

It is apparent that no one example and no single influence accounts for the Australian Constitution. The Australians were British, accustomed to British government and, with few exceptions—notably occasional republicans and an even smaller number of highly educated students of politics who found themselves unable to endorse responsible government—anxious to preserve the political system which they knew. The failure of the Australian constitutional conventions to accept British responsible government without modification resulted, of course, from a desire to preserve the individuality and as much as possible of the authority of the colonies which the delegates represented. Most Australians insisted that the new government must be federal. In England the constitution had not developed along federal lines; in Canada federal principles had been subordinated to an extent which many Australian federalists considered excessive and impossible to follow. Australian interest in the American Constitution was obviously not due to the fact that it was American, but to the fact that it was the classic example of federal government. Some Australians were frankly hostile to American institutions; others, resident in the larger colonies which had little to gain from federal institutions, became similarly hostile through opposing the federal principles which had been applied in the American Constitution Surely few Australians seem to have desired to follow American precedent simply because of their admiration for the United States, though some were nevertheless great ad-

mirers both of the country and its institutions. When the smaller colonies sought some basis of union which would preserve their identity, they turned to the United States and, discovering that for which they were seeking, found the American system of government good. When the larger colonies, needing no special guarantees and fearing the effect upon their influence of the checks which the smaller colonies wished to adopt, examined the same system of government, they tended to see only the weaknesses. Each side found that for which it sought. The Senate, the principle of reserving to the states all powers not delegated to the Commonwealth or forbidden to the states, and the other safeguards of the powers and prestige of the states, were insisted upon by the smaller colonies not because the safeguards were American but because without them federation seemed to cost too much; they were finally accepted by the larger colonies not because the leaders of the latter had been convinced of the superiority or desirability of American institutions, but because without such provisions federation seemed impossible of attainment. The constant quotations and citations from authorities on America seem, in the debates on these points, at least, simply to have bolstered opinions and attitudes which would have been much the same even without these particular arguments and illustrations, and in most of the decisions on these issues it is difficult to see that a single vote was changed by the consideration of American precedent. Each delegation saw and spoke as the strength or weakness of its colony influenced it, and voted accordingly, except when, in isolated cases, a delegate took the attitude that his colony might gain enough from federation to justify some sacrifice of power or influence, or when, rarely, a delegate put loyalty to Australia ahead of loyalty to his colony.

American phrasing and American judicial decisions did, however, directly influence Australian drafting and provi-

sions. When words in the American Constitution exactly fitted the needs of Australian draftsmen, and had been demonstrated to be effective, they were adopted, but when they needed modification, either to meet different conditions or because they had proved vague or inadequate, they were modified or discarded without hesitation. American judicial decisions in such matters as irrigation, interstate commerce, and the regulation of Sunday observance, actually influenced votes. In these cases American precedent was occasionally used to support preconceived attitudes, but there was generally a greater willingness to be guided by precedent and experience, a more open-minded consideration of the situation, and there were fewer disparaging comments on American institutions, than when state rights were involved.

Only a few of the delegates seem to have had anything like a profound knowledge or understanding of America. None had any first-hand knowledge of American government worth calling such. A few of the lawyers had a very considerable book knowledge of American constitutional history and law Several had rather a superficial knowledge of American political institutions, mostly derived from a more or less careful reading of Bryce and from such information as was made readily available by the newspapers or in manuals and reference works prepared especially for the conventions. A large number displayed almost no knowledge of America or American government, although they were, in general, followers of leaders who did possess such knowledge.

In the end, however, one fact at least remains. Australia could have followed England, abandoning federal principles; or, adopting them, she could have followed Canada or Switzerland or Germany. She did not do so. The framework into which she fitted a pattern that was new in many details, and more intricate than anything that had preceded it, was that of the American Constitution.

APPENDIX I

THE RESOLUTIONS ADOPTED AT MELBOURNE IN 1890

(Resolved):

"1. That, in the opinion of this Conference, the best interests and the present and future prosperity of the Australian Colonies will be promoted by an early union under the Crown; and, while fully recognising the valuable services of the Members of the Convention of 1883 in founding the Federal Council, it declares its opinion that the seven years which have since elapsed have developed the national life of Australia in population, in wealth, in the discovery of resources, and in self-governing capacity to an extent which justifies the higher act, at all times contemplated, of the union of these Colonies, under one legislative and executive Government, on principles just to the several Colonies.

"2. That to the union of the Australian Colonies contemplated by the foregoing resolution, the remoter Australasian Colonies shall be entitled to admission at such times and on such conditions as may be hereafter agreed upon.

"3. That the Members of the Conference should take such steps as may be necessary to induce the Legislatures of their respective Colonies to appoint, during the present year, Delegates to a National Australasian Convention, empowered to consider and report upon an adequate scheme for a Federal Constitution.

"4. That the Convention should consist of not more than seven Members from each of the self-governing Colonies, and not more than four Members from each of the Crown Colonies."[1]

[1] *Official Record... Federation Conference, 1890*, p. 3 *et seq.* (February 14, 1890).

APPENDIX II

PARKES' RESOLUTIONS AT SYDNEY IN 1891

(Resolved):

"That in order to establish an enduring foundation for the structure of a Federal Government, the principles embodied in the Resolutions following be agreed to:—

"(1.) That the powers and privileges and territorial rights of the several existing Colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.

"(2.) That the trade and intercourse between the Federated Colonies, whether by means of land carriage or coastal navigation, shall be absolutely free.

"(3.) That the power and authority to impose Customs duties shall be exclusively lodged in the Federal Government and Parliament, subject to such disposal of the revenues thence derived as shall be agreed upon.

"(4.) That the Military and Naval Defence of Australia shall be entrusted to Federal Forces, under one command.

"Subject to these and other necessary conditions, this Convention approves of the framing of a Federal Constitution, which shall establish,—

"(1.) A Parliament, to consist of a Senate and a House of Representatives, the former consisting of an equal number of members from each Province, to be elected by a system which shall provide for the retirement of one-third of the members every — years, so securing to the body itself a perpetual existence combined with definite responsibility to the electors, the latter to be elected by districts formed on a population basis, and to possess the sole power of originating and amending all Bills appropriating revenue or imposing taxation.

"(2.) A Judiciary, consisting of a Federal Supreme Court, which shall constitute a High Court of Appeal for Australia, under the direct authority of the Sovereign, whose decisions as such shall be final.

"(3). An Executive, consisting of a Governor-General, and such persons as may from time to time be appointed as his advisers, such persons sitting in Parliament, and whose term of office shall depend upon their possessing the confidence of the House of Representatives expressed by the support of the majority."[1]

[1] *Official Record* ... [Sydney, 1891] *Convention*, p. xii (March 4, 1891)

APPENDIX III

THE REPORT OF THE JUDICIARY COMMITTEE OF THE 1891 CONVENTION

The "Report of the Committee Appointed to Consider [the] Establishment of a Federal Judiciary; Its Powers and Functions" at the Sydney 1891 Convention was largely the work of Mr. Inglis Clark, an ardent admirer of the American Constitution and particularly of the American system of federal courts. The Report accordingly follows Article III of the American Constitution very closely.[1] The Report is given in full below save for clauses 9 and 10, dealing with appeals to the Privy Council, and 12 and 13, dealing with qualifications of counsel admitted to practice in federal courts.

"1. The Judicial power of the Union shall be vested in one High Court, to be called the High Court of Australia, and in such Inferior Courts as the Federal Parliament may from time to time create and establish.

"2. The Judges of both the High Court and the Inferior Courts shall hold their offices during good behaviour, and shall receive such salaries as shall from time to time be fixed by the Federal Parliament; but the salary paid to any Judge shall not be diminished during his continuance in office.

"3. The Judges of the High Court and of the inferior Courts shall be appointed, and may be suspended from the discharge of their duties or removed from office, by the Governor-General by and with the advice of the Federal Executive Council; but it shall not be lawful for the Governor-General to remove any Judge without an Address from both Houses of the Union Parliament recommending such removal, such Address to be adopted by a majority of two-thirds of the total number of the members of each House of the Union Parliament.

[1] *Supra*, p. 189.

"4. The Judicial power of the Union shall extend—

I. To all cases arising under this Act:

II. To all cases arising under any Laws made by the Union Parliament, or under any treaty made by the Union with any other Country

III. To all cases of Admiralty and Maritime jurisdiction:

IV. To all cases affecting the Public Ministers, Consuls, or other Representatives of other Countries:

V. To all cases in which the Union shall be a party:

VI. To disputes between two or more States:

VII. To disputes between residents of different States:

VIII. To disputes relating to the same subject matter claimed under the laws of different States:

"5. Nothing in this Act contained shall be construed to extend the judicial power of the Union to any suit in law or equity commenced or prosecuted against any State nor until otherwise provided by the Union Parliament against the Union by any person whatsoever.

"6. In all cases affecting the Public Ministers, Consuls, or other Representatives of other Countries, and in all cases in which a State shall be a party, or in which a Writ of Mandamus or Prohibition shall be sought against a Minister of the Union, the High Court shall have original jurisdiction, and in all other cases the High Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Union Parliament shall authorize.

"7. The Union Parliament may from time to time confer original jurisdiction on the High Court in such other cases within the judicial power of the Union as it may think fit.

"8. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Union Parliament shall from time to time prescribe, to hear and determine appeals from all final judgments, decrees, sentences, and orders of the highest Court of final resort now established in any of the States, or of highest Court of final resort which may hereafter be established in any State, whether such Court is or shall be a

Court of Appeal or of original jurisdiction, and in all criminal cases, and in all cases arising under any law made by the Union Parliament, or under any law made by the Legislature of any State, the judgment of the High Court shall be final and conclusive; and no appeal shall be brought in any such cases as aforesaid from any judgment, decree, sentence, or order of the High Court to any Court of Appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to her Majesty in Council may be ordered to be heard.

"11. The trial of all indictable offences cognisable by any Court established under the authority of this Act shall be by jury, and every such trial shall be held in the State where the offence has been committed, and when not committed within any State the trial shall be held at such place or places as the Union Parliament may by law direct." [1]

[1] *Official Record*... [Sydney, 1891] *Convention*, p. clxiii *et seq.*

APPENDIX IV

"THE COMPROMISE OF 1891" ON THE FINANCIAL POWER OF THE SENATE

1891 Draft Bill, Chapter I, Part V, Clause 55.

"(1) The Senate shall have equal power with the House of Representatives in respect of all proposed Laws, except Laws imposing taxation and Laws appropriating the necessary supplies for the ordinary annual services of the Government, which the Senate may affirm or reject, but may not amend. But the Senate may not amend any proposed Law in such a manner as to increase any proposed charge or burden on the people.

"(2) Laws imposing taxation shall deal with the imposition of taxation only.

"(3) Laws imposing taxation, except Laws imposing duties of Customs on imports, shall deal with one subject of taxation only.

"(4) The expenditure for services other than the ordinary annual services of the Government shall not be authorized by the same Law as that which appropriates the supplies for such ordinary annual services, but shall be authorized by a separate Law or Laws.

"(6) In the case of a proposed Law which the Senate may not amend, the Senate may at any stage return it to the House of Representatives with a message requesting the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make such omissions or amendments, or any of them, with or without modifications."[1]

In the Constitution Act of 1900 the corresponding provisions are:—

"53. Proposed laws appropriating revenue or moneys, or

[1] *Syd. 1891 Debs.*, p. cxi; G. B. Barton, ed., *The Draft Bill to Constitute the Commonwealth of Australia*, p. 38 *et seq.*

imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

"The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

"The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

"The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

"Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

"54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

"55. Laws imposing taxation shall deal only with the imposition of taxation, and any provisions therein dealing with other matter shall be of no effect.

"Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

"56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

APPENDIX V

BARTON'S RESOLUTIONS AT ADELAIDE IN 1897

(Resolved):

"That, in order to enlarge the powers of self-government of the people of Australia, it is desirable to create a Federal Government which shall exercise authority throughout the Federated Colonies, subject to the following principal conditions:—

"I. That the powers, privileges, and territories of the several existing colonies remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern.

"II. That, after the establishment of the Federal Government, there shall be no alteration of the territorial possessions or boundaries of any colony without the consent of the colony or colonies concerned.

"III. That the exclusive power to impose and collect duties of Customs and excise, and to give bounties, shall be vested in the Federal Parliament.

"IV. That the exclusive control of the military and naval defences of the Federated Colonies shall be vested in the Federal Parliament.

"V. That the trade and intercourse between the Federated Colonies, whether by land or sea, shall become and remain absolutely free.

"Subject to the carrying out of these, and such other conditions as may be hereafter deemed necessary, this Convention approves of the framing of a Federal Constitution which shall establish—

(a) A Parliament, to consist of two Houses, namely a States Assembly or Senate, and a National Assembly or House of Representatives: the States Assembly to

consist of representatives of each colony, to hold office for such periods and be chosen in such manner as will best secure to that Chamber a perpetual existence, combined with definite responsibility to the people of the State which shall have chosen them: the National Assembly to be elected by districts formed on a population basis, and to possess the sole power of originating all Bills appropriating revenue or imposing taxation.

(b) An Executive, consisting of a Governor-General, to be appointed by the Queen, and of such persons as from time to time may be appointed as his advisers.

(c) A Supreme Federal Court, which shall also be the High Court of Appeal for each colony in the Federation." [1]

[1] *Official Report*... [Adelaide] *Convention* [1897], p. 17.

APPENDIX VI

EXCERPT FROM A SPEECH OF HIGGINS ON EQUAL STATE REPRESENTATION (Adelaide, 1897)

The following excerpts from one of the speeches in which Mr. Higgins attacked equal state representation in the Senate is given to illustrate the way in which American history and precedent were sometimes used in the Australian federal movement. Mr. Higgins was unusually well-informed, but he was capable, like other speakers, of making slips and occasionally of exaggerating or of piecing out an argument with doubtful statements.

Mr. Higgins had been arguing that the provision for the equal representation of the states in the Senate had been adopted in the Philadelphia Convention only by a narrow margin and with most of the great leaders opposed.[1] He continued: "I apprehend that most members have read the debates on which equal representation was founded. It will be remembered that it was carried by a very narrow majority. They will remember that the strongest and the best men voted against it, such men as Benjamin Franklin, Madison, King, Wilson, Morris, and Alexander Hamilton. The strongest and best men said, 'Let us not have equal representation'. Let me read from Bancroft how the thing was. They only submitted to equal representation because Delaware, Rhode Island [actually Rhode Island did not participate in the Convention], and some of the smaller States said this: 'We have the British at our gates. They still have forts, and unless they give us equal representation we will go over to the British'. Mr. Bedford, according to Bancroft, 'defied them to dissolve the Confederation, for ruin would stare them in the face'.

'Mr. O'Connor: How has it worked for 100 years?

[1] *Supra*, p. 104.

'Mr. Trenwith: Very badly.

'Mr. Higgins: I may also read the words of Wilson: 'A citizen of America is a citizen of the general Government, and is a citizen of the particular State in which he may reside. . . . The general Government is not an assemblage of States, but of individuals, for certain political purposes; it is not meant for the States, but for the individuals composing them; the individuals therefore, not the States, ought to be represented.' Then we pass to Mr. Madison's views: 'If there was real danger to the smaller States I would give them defensive weapons. The great danger to our general government is this, that the Southern and Northern interests of the continent are opposed to each other . . . [Mr. King's statement to the same effect was then quoted:] Although it [equal representation] was carried by a majority of one only, and although Madison and his comrades object to it most strongly, and determined on the morning to divide upon the matter, they said 'No, let us yield this. Our supreme interests are concerned: we must settle this point in order that we may not preserve the British enemy at our gates'. They simply yielded to equal representation in terror, under domination; we are asked now, after the experience of 100 years, to yield the same thing when in no terror and under no domination.

'Sir Joseph Abbott: There is another story called the Connecticut compromise.

'Mr. Higgins: With all respect, I do not think that is another story. The Connecticut compromise was to give equal representation to the small and large States in the Senate, and to give representation according to population in the other House: but Madison and King and Franklin, and Hamilton, and Morris, and all the strong men were against that compromise. . . . I have read, and Mr. Glynn read yesterday certain passages from Dr. Bryce's work, which showed that this equal representation has been absolutely futile in achieving its objects. He says, in substance, that there has never been any difference of interests between the large States and small States as such . . . "

A little later Mr. Higgins said: "I recollect that it was the Senate of the United States, in which all the States were equally represented, that opposed the addition of new States from the outlying territory, for fear of the slavery States being outvoted in the Senate. Equal representation has worked ill there, and it was the means of preventing the development of the great western territory for some time, and also prevented the sub-division of the territory into States. Our proper destiny is the sub-division of these huge areas, and if we give equal representation that destiny will be seriously checked." [1]

[1] *Official Report* ... [Adelaide] *Convention* [1897], p. 645 *et seq.*

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Particularly vol. lv, 1900, at the time of the enactment of the Constitution Bill.

Commonwealth of Australia Constitution Bill. Reprint of the Debates in Parliament, the Official Correspondence with the Australian Delegates, and other Papers. London, 1900 (1901). 199 pp.

New South Wales

New South Wales Parliamentary Debates.

Votes and Proceedings of the Legislative Assembly during the Session of ——, with the various Documents connected therewith.

This reprints many works, reports, and articles from other colonies as well as those produced in New South Wales. The Parliamentary Papers of the other colonies frequently include papers which originated in another colony.

Queensland

Queensland Parliamentary Debates.

Queensland: Journals of the Legislative Council, with Papers.

Includes the Votes and Proceedings of both houses, and the Papers of both.

South Australia

Debates in the Houses of the Legislature during the —th Session of the —th Parliament.

Beginning in 1896 there are separate volumes for the Legislative Council and the Legislative Assembly. The volumes are dated rather than numbered.

Proceedings of the Parliament of South Australia with Copies of Documents ordered to be printed.

Bound under the title *Parliamentary Papers.*

Tasmania

The parliamentary debates of Tasmania were printed by the Hobart *Mercury* and not otherwise.

Journals and Printed Papers of the Parliament of Tasmania.

Victoria

Victoria Parliamentary Debates.

Votes and Proceedings of the Legislative Assembly.

Papers Presented to the Parliament.

These include reprints of more than usual value.

Western Australia

Western Australia Parliamentary Debates.

Minutes and Votes and Proceedings of the Parliament ... with Papers.

Federal Council of Australasia

Official Record of the Debates.

For each of the eight sessions from 1886 to 1899.

NEWSPAPERS

The [Adelaide] *Observer*

This was a weekly publication of about forty-eight pages. Politically it was conservative and opposed to Kingston. Its editorials were weak. It has valuable material on the Adelaide session of the 1897–1898 Convention.

The [Adelaide] *South Australian Register*

Published every week day, usually in eight pages. This was a Free Trade paper, opposed to Kingston. It upheld the small states view, demanding coördinate powers for the senate and opposing all deadlock provisions, but in the end it strongly supported the 1898 Constitution Bill, as better than was likely to be secured again by the smaller colonies.

The Brisbane Courier

This was published each week day in eight or sometimes in twelve pages. It strongly supported Griffith and consistently promoted federation, criticizing Nelson's administration for lack of enthusiasm. It gave the federal news fully and regularly, and seems to have been indispensable to the Queensland federal movement.

The [Hobart] *Mercury*

Published each week day, usually in four pages. It did not take a vigorous stand on federation, being convinced that Tasmania would suffer financially but perceiving also that union was inevitable.

The [Launceston] *Examiner*

Published daily in eight or sixteen pages. The paper refused to be pessimistic about the future of the colony under federation, and gave the federal movement its support heartily.

The [Melbourne] *Age*

Published every week day in eight or ten or more pages. This was the journal owned and edited by the vigorous David Syme. It was liberal, outspoken, very ably edited It favored federation but took the large state and Victorian point of view, demanding a maximum of democracy and inclining to be hostile toward the senate. Its federal news was very full though it printed speeches and documents to rather a less extent than the *Sydney Morning Herald.* It was perhaps more critical, more anxious to mould public opinion, and more independent in its attitude towards federal issues than was the Sydney paper. It showed the fullest knowledge of the United States of any of the Australian papers.

The [Melbourne] *Argus*

Published every week day in eight or ten or more pages. The *Argus* was more conservative than *The Age,* and less aggressive. It was more disposed to compromise on federal controversial points, preferring the large state solution but accepting equal state representation in the senate and opposing the popular referendum.

The [Perth] *West Australian*

Published every week day, usually in eight pages. It was a quiet and conservative paper, almost colorless in its views on federation. It presented both sides impartially. In politics it supported Sir John Forrest.

The [Perth] *Western Mail*

Published weekly, usually in forty-eight pages. Like *The West Australian* it took no vigorous stand on federation, apparently expecting that the colony would join the union but also expecting that the cost would prove heavy.

The [Sydney] *Bulletin*

Published weekly, under the extremely vigorous and effective editorship of J. F. Archibald. At first *The Bulletin* opposed feder-

ation, but later supported the cause with enthusiasm. The paper's preferences were for a republic; its disrespect for titles, rank and position were breath-taking. Its cartoons, especially in the New South Wales federal campaign of 1898, were masterpieces in keenness and popular appeal, and its paragraphs were scarcely less striking.

The [Sydney] *Daily Telegraph*

Published every day in eight or more pages, edited by J. L. Brient. The editing was not conservative; headliness, paragraphing, and heavy type were used effectively and contrary to the usual Australian practice; the views expressed were definite and uncompromising and the paper was seldom restrained either in praise or in blame. The *Daily Telegraph* was strongly federalist until the senate was constituted in 1891; it strongly opposed the 1891 Bill as adopted by the Convention It also opposed the Constitution Bill in 1898, in the campaigns both of that and of the following year, without restraint and sometimes with more regard for effect than for fairness or even accuracy. Its news accounts were full, its references to the United States were few and not always correct in fact.

The *Sydney Morning Herald*

Published every week day, in twelve or sixteen or more pages. It was conservative, carefully edited, full in its news accounts, and customarily printed debates, speeches, and documents, and summarized country opinion. It was a Free Trade paper, usually pro-Parkes and, later, usually pro-Reid, anti-Dibbs and anti-Lyne, though not invariably so. It was strongly for federation and against the provincial attitude taken by many of the New South Wales leaders. Occasionally there was a tendency to give the news a federalist color, though anti-federal opinion and speeches were carefully reported. Series of articles on federal topics were carried frequently.

Accounts of the Federal Movement

Cephas Daniel Allin, *The Early Federation Movement of Australia.* Kingston, 1907. 431 pp.

A full and thoroughly dependable account of the early attempts at federation.

Australian Encyclopedia, article *Federation.*

Brief and rather superficial.

James Sykes Battye, *Western Australia; A History from its Discovery to the Inauguration of the Commonwealth.* Oxford, 1924. 480 pp.

The final chapter gives a very brief sketch of the federal movement from the point of view of Western Australia.

George Burnett Barton, *Historical Sketch of Australian Federation*, in the *Year Book of Australia*, 1891 (pp. vi-xiv).

The succeeding volumes of the Year Book of Australia also include some material of value, particularly summaries of the work of conferences of the premiers.

Andrew Inglis Clark, *Studies in Australian Constitutional Law*. Melbourne, 1905 (2nd ed.). xvi + 447 pp.

This includes no formal account of the federation movement but necessarily pays much attention to influences and precedents which formed the Constitution

Hugh Edward Egerton, *Federations and Unions within the British Empire*. Oxford, 1924 (2nd ed.). 306 pp.

Includes a brief but careful summary of the federation movement in Australia, and reprints the Report of the Committee for Trade and Plantations of the Privy Council on the Proposed Australian Constitution, and the Constitution Act of 1900.

Charles E. Lyne, *Life of Sir Henry Parkes, G.C.M.G., Australian Statesman*. London, 1897 (English ed.). 9 + 571 pp.

An unsatisfactory account of Sir Henry's career by a former member of the staff of the *Sydney Morning Herald* A few pages are devoted to the federal movement.

W. Harrison Moore, *The Constitution of the Commonwealth of Australia*. Melbourne and London, 1910 (2nd ed.). xxviii + 782 pp.

Includes a sketch of the federal movement and gives, incidentally, much attention to American precedent.

Walter Murdoch, *Alfred Deakin: a Sketch*. London, Bombay, Sydney, 1923. vii + 320 pp.

Not "official", though commissioned by Mrs. Deakin; an account by an admiring friend who calls himself a "biased witness", but who is nevertheless frank. A few pages are devoted to Deakin's part in the federal movement.

Sir Henry Parkes, *Fifty Years in the Making of Australian History*. London, 1892. 2 vols.

Includes Parkes' account of the federal movement through 1891 together with some documents. The account is not full.

Sir John Quick, *The Legislative Powers of the Commonwealth and the States of the Commonwealth*. Melbourne and Sydney, 1919. xxxii + 994 pp.

Throws some light on the use of American precedent.

Sir John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*. Sydney, 1901. xxxvii + 1008 pp.

Includes the best account of the federal movement, and a criti-

cal and historical study of the Constitution Act, clause by clause. Both of the authors played parts of some importance in the federal movement.

Sir George Houston Reid, *My Reminiscences.* London, 1917 xi + 395 pp.

Includes a brief, informal and incomplete account of Reid's part in the federal movement.

Bernhard Ringrose Wise, *The Commonwealth of Australia.* London, 1913 (2nd ed, rec.). xviii + 350 pp.

Part II includes a little material on the federal movement which Wise does not give in his longer account.

Bernhard Ringrose Wise, *The Making of the Australian Commonwealth.* London, New York, etc, 1913. xiii + 365 pp.

Not an "histoire documentée" of the movement; the record of an eyewitness—who, much of the time, was also a participant. The account is inclined to be partisan—pro-Parkes, pro-O'Connor, and pro-Barton, anti-Reid As a newspaper man, a leading federalist, and a member of the 1897-98 Convention, Wise was in a position to know many things not recorded in the official accounts. He gives little beyond the New South Wales story, however, though the appendices give unsatisfactory accounts of phases of the Victorian and Tasmanian movements.

ARTICLES AND OTHER WORKS PUBLISHED IN CONNECTION WITH THE MOVEMENT

Sir Richard Chaffee Baker, *The Commonwealth Constitution of Australia.* Adelaide, 1900, 1901.

A pamphlet in which Sir Richard set forth his views on the nature of the federation, particularly his preference for American federal principle.

The pamphlet is bound at the Royal Empire Society Library in vol. i of *Australia—Pamphlets—Political.*

——, *The Executive in a Federation.* Adelaide, 1897.

A pamphlet setting forth Baker's objections to British responsible government in a federation.

Bound at the Royal Empire Society with the preceding work.

——, *Federation.* Adelaide, 1897.

A reprint, in one pamphlet, of articles written for the country press of South Australia.

Bound at the Royal Empire Society with the preceding works, vol. ii.

——, *A Manual of Reference to Authorities for the Use of Members of the National Australasian Convention which will assemble at*

Sydney on March 2, 1891, for the Purpose of Drafting a Constitution for the Dominion of Australia. Adelaide, Melbourne, Sydney, 1891. 300 pp.

A compilation of precedents, principles, and references, which was much used both in 1891 and in 1897-98.

George Burnett Barton, *Notes on Australian Federation and the Draft Constitution Bills framed by the Conventions of 1891 and 1897.* Reprinted, from the Sydney *Evening News*, in New South *Wales Votes and Proceedings*, 1897, vol. ii, pp 343-404.

A sharp attack on the 1897-98 draft bill, and in particular on its similarity to the American Constitution.

Robert Randolph Garran, *The Coming Commonwealth: an Australian Handbook of Federal Government* London, Sydney, 1897. 192 pp.

A handbook, similar in purpose and in some of its content to that of Baker, but with a tendency to support the large rather than the small colony point of view.

Sir Samuel Walker Griffith, *Notes on Australian Federation, Its Nature and Probable Effects* Brisbane, 1897.

A pamphlet reprinted from *The Brisbane Courier*, bound at the Royal Empire Society as part of *Australia—Pamphlets—Political.* It is also reprinted in New South Wales *Votes and Proceedings*, 1897, vol ii, and Queensland *Votes and Proceedings*, 1897, vol. xlvii, part ii.

——, *Notes on the Constitution framed by the Adelaide Convention of 1897.* Brisbane, 1897.

Bound at the Royal Empire Society with the preceding work.

——, *Some Conditions of Australian Federation.* Brisbane, 1896.

Devotes much attention to finance.

Thomas C Just, compiler, *The Leading Facts Connected with Federation: compiled for the Information of the Tasmanian Delegates to the Australasian Convention, 1891*; printed as Paper No. 112, Tasmania *Journals and Papers of Parliament*, 1891.

W. Harrison Moore, *Constitution Making in Australia,* an article in the *National Review*, vol. xxxi (April, 1898), pp. 269-279.

Observation upon the differences between the 1891 and the 1898 Bills.

Sir Henry Parkes, *The Federal Government of Australasia: Speeches delivered on various occasions, 1889-1890.* Sydney, 1890 189 pp.

The reports were often, necessarily, imperfect, and there has been some "selection, arrangement, correction, and revision".

Howard Willoughby, *Australian Federation· Its Aims and Possibilities with a Digest of the proposed constitution, official statistics, and a review of the National Convention.* Melbourne, 1891. 154 pp.

The first part of this work appeared in *The Argus*. The work deals only with main principles, not details. Some use was made of American authorities.

Bernhard Ringrose Wise, *The Commonwealth of Australia*, in the *National Review*, vol. xxxiii (July, 1899), pp 823-844.

MISCELLANEOUS

Commonwealth of Australia, *Biographical Handbook and Record of Elections for the Parliament of the Commonwealth*. Melbourne, 1926 588 pp.

Includes biographical sketches and portraits of many of the federal leaders.

Fred Johns, *Johns's Notable Australians and Who Is Who in Australasia*. Adelaide, 1908 (2nd ed.). 370 pp

Part III is devoted to the "Notable Dead of Australasia", and a supplement was added in 1911.

Arthur Wilberforce Jose, *Builders and Pioneers of Australia*. London and Toronto, 1928. 213 pp.

Includes sketches of the careers of Parkes and Deakin

Arthur Wilberforce Jose and Herbert James Carter, *The Australian Encyclopedia*. Sydney, 1925. 2 vols.

Gives biographical sketches of most of the federal leaders and some articles bearing on federation.

Philip Mennell, *The Dictionary of Australasian Biography*. London, 1892. 542 pp.

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